

83-892

Supreme Court, U.S.
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ALEXANDER

No. _____

**In the Supreme Court
of the United States
OCTOBER TERM, 1983**

**CALIFORNIA STATE DEPARTMENT OF EDUCATION;
CALIFORNIA STATE BOARD OF EDUCATION; AND
BILL HONIG, IN HIS OFFICIAL CAPACITY AS
SUPERINTENDENT OF PUBLIC INSTRUCTION,**

Petitioners,

v.

**LOS ANGELES BRANCH NAACP; BEVERLY HILLS-
NAACP; SAN PEDRO-WILMINGTON NAACP; WATTS
NAACP; SAN FERNANDO VALLEY NAACP; AND
CARSON NAACP,**

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit err in holding that the Equal Education Opportunities Act of 1974, 20 U.S.C.A. § § 1701-1758, abrogates the States' immunity from suits in the federal courts as guaranteed by the Eleventh Amendment to the Constitution of the United States?

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QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit err in holding that the Equal Education Opportunities Act of 1974, 20 U.S.C.A. § § 1701-1758, abrogates the States' immunity from suits in the federal courts as guaranteed by the Eleventh Amendment to the Constitution of the United States?

LIST OF PARTIES

Petitioners: California State Department of Education
California State Board of Education
Bill Honig, in his official capacity as
Superintendent of Public Instruction¹

Respondents: Los Angeles Branch NAACP
Beverly Hills-NAACP
San Pedro-Wilmington NAACP
Watts NAACP
San Fernando Valley NAACP
Carson NAACP

OPINIONS BELOW

The district court's decision granting the petitioners' motions to dismiss appears at 518 F.Supp. 1053 (C.D. Cal. 1981). The opinion of the Court of Appeals for the Ninth Circuit, which the petitioners seek to review here, appears at 714 F.2d 946 and is reproduced in Appendix I.

JURISDICTION

The Court of Appeals filed and entered its opinion on September 1, 1983. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

¹Bill Honig, in his official capacity as Superintendent of Public Instruction, was substituted as a party by the Court of Appeals for the Ninth Circuit, reflecting Mr. Honig's succession to the office formerly held by Wilson Riles. George Deukmejian was substituted in this case to reflect his succession as Governor of California, succeeding Edmund G. Brown, Jr. [714 F.2d 946 (9th Cir. 1983).]

The Governor does not take part in this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are significantly involved in this case, and because of their length, are cited here with their pertinent texts set out verbatim in Appendix II.

1. Title 20, United States Code, sections 1701 through 1758.
2. The Eleventh Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Branches of the NAACP centered in and around the City of Los Angeles brought the underlying action on April 15, 1981, against the California State Department of Education; the California State Board of Education; Wilson Riles, then Superintendent of Public Instruction for the State of California; and the Governor of California. Additionally, the local school district, its Board of Trustees and Superintendent, were also joined. (*L.A. Branch NAACP v. L.A. Unified School Dist.* 714 F.2d 946, 947-948 (9th Cir. 1983).]

Respondents sought to invoke federal court jurisdiction in the district court pursuant to the First, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 1988; 42 U.S.C. § 2000d; 28 U.S.C. § 1331; 28 U.S.C. § 1343(3); 28 U.S.C. § 1343(4); 20 U.S.C. § 2201; and 20 U.S.C. § 2202.

In essence, the plaintiffs below allege that the state entities and officials, along with the local school defendants, created and maintained an unconstitutionally segregated school system in the Los Angeles Unified School District. (*Id.*)

The petitioning state defendants moved to dismiss the action pursuant to Federal Rules of Civil Procedure, rule 12(b) for lack of jurisdiction and failure to state a claim upon which relief could be granted. (518 F.Supp. 1053.) The district court granted the motion as to the State Board and Department of Education on the grounds that the Eleventh Amendment bars suits against states and their organizational sub-units in federal courts. (*Id.*, p. 1063.) Claims against the Superintendent of Public Instruction and the Governor were also dismissed by the district court for failure to allege a case and controversy under Article III of the U.S. Constitution. The NAACP was granted leave to amend as to the Superintendent and Governor. (*Id.*)

Subsequently, the district court dismissed the amended complaint against the Superintendent and Governor. The NAACP's appeal to the Ninth Circuit followed. The Court of Appeals reversed the dismissal of all the State entities and officials by the district court with the exception of the dismissal of the Governor. (714 F.2d 946, 948.)

The Court of Appeals allowed the NAACP to raise the Equal Educational Opportunities Act (20 U.S.C. § § 1701-1758) for the first time on appeal as a basis for liability of the State Board of Education, State Department of Education, and Superintendent. The Court of Appeals recognized that the NAACP had failed to plead the EEOA or to raise it in any proceeding before the district court. (714 F.2d 946, 951.)

In its opinion, the Court of Appeals declared, for the first time, that the provisions of the EEOA abrogate the immunity from suit in federal courts granted the States and their constituent entities under the Eleventh Amendment. (714 F.2d 946, 951-952.)

REASONS FOR GRANTING THE WRIT

I

THE WRIT SHOULD BE GRANTED SINCE IT INVOLVES SERIOUS QUESTIONS OF CONSTITUTIONAL LAW AND FEDERALISM WHICH WERE DECIDED FOR THE FIRST TIME BY THE COURT OF APPEALS

This petition presents a question of first impression before this court. The Court of Appeals below held that Congress, by enacting the EEOA, 20 U.S.C. § § 1701-1758, abrogated the State's Eleventh Amendment immunity from suit in federal court (714 F.2d 946, 950-951). No other case has presented this precise question to this court.

Initially, the Court of Appeals asserted, correctly, that as a general premise, "State immunity under the Eleventh Amendment 'will be considered abrogated . . . only when the statute on its legislative history clearly indicates a Congressional intention to abrogate that immunity.'" (*Supra*, 950.) Petitioners respectfully suggest that this principle has been improperly applied in respect to the EEOA and that the lower court failed to follow the analysis required to lift State immunity. Petitioners have found no other case which discusses the State's Eleventh Amendment immunity in conjunction with the EEOA.

The decision of the lower court raises serious questions involving federalism and the balance between State and federal relations. Additionally, sensitive questions concerning federal court jurisdiction and power are left partially or totally unanswered.

II

**CONGRESS DID NOT EXPRESS AN INTENTION
TO ABROGATE THE IMMUNITY GRANTED
THE STATES BY THE ELEVENTH AMEND-
MENT WHEN IT ENACTED THE EQUAL
EDUCATIONAL OPPORTUNITIES ACT**

The Court of Appeals for the Ninth Circuit has decided that Congress, by enacting the EEOA, expressed an intention to abrogate the States' immunity guaranteed by the Eleventh Amendment. Such a holding makes the States subject to suit by private persons in federal courts.²

**A. Eleventh Amendment Immunity May Be Abrogated
Under Limited Circumstances**

Traditionally, the Eleventh Amendment has barred suits by private persons or entities against the States or the States' subsidiary agencies. (*Alabama v. Pugh* (1978) 438 U.S. 781, 782; *Edelman v. Jordan* (1974) 415 U.S. 651, 658-659; and *Quern v. Jordan* (1979) 440 U.S. 332.) A State may consent to federal court jurisdiction. (*Alabama, supra.*) The Court of Appeals below recognized that California has never consented to jurisdiction or in any fashion waived its Eleventh Amendment immunity. (*L.A. Branch NAACP, supra*, at 950.)

In addition to consensual waiver of immunity by a State, this court has recognized that Congress, acting

²The Eleventh Amendment provides that:

i "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The bar of the Eleventh Amendment has been extended to include a State's own citizens, *Hans v. Louisiana* (1889) 134 U.S. 1.

pursuant to authority granted it in the Constitution and certain amendments to the Constitution, may abrogate State immunity. (*Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 455-456; *Employees v. Missouri Public Health Dept.* (1973) 411 U.S. 279, 282-285; *Quern, supra*, at 342-345.)

In order for Congress to lift the Eleventh Amendment immunity of the States, it must do so in a clear and unambiguous manner. The standard and analysis necessary to determine if Congress has legislatively lifted the States' immunity was articulated in *Quern v. Jordan, supra*. In that case, it was established that when Congress acts pursuant to section 5 of the Fourteenth Amendment to pass legislation which is intended to abrogate traditional State immunity, its intention to do so must be in clear language in the statute or clearly evident from the legislative history of the enactment. (*Id.*, pp. 342-344.) As discussed below, neither the EEOA, it's history nor the analysis of the court below meets this standard.

B. The EEOA Cannot Be Read To Abrogate Eleventh Amendment Immunity

The analysis employed by the Court of Appeals failed to consider the legislative history, plain language, and structure of the EEOA. The analysis of the court below was brief and cursory:

"State immunity under the Eleventh Amendment: 'will be considered abrogated . . . only when the statute or its legislative history clearly indicates a Congressional intention to abrogate that immunity.' *V.O. Motors, Inc. v. California State Board of Equalization*, 691 F.2d 871, 872 (9th. Cir. 1982). Neither 28 U.S.C. § 1331, nor § 1343, nor 42 U.S.C. § 1983 contains an

expression of Congressional intent to abrogate California's immunity. Therefore, none operates to lift the Eleventh Amendment bar." [Citations omitted.]

"The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758, involves a very different analysis. 20 U.S.C. § 1703 provides, in part, that:

'No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by (a) the deliberate segregation by an *educational agency* of students on the basis of race, color, or national origin among or within schools; (b) the failure of an *educational agency* which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system; . . . (d) discrimination by an *educational agency* on the basis of race, color, or national origin in the employment conditions, or assignment to schools of its faculty, or staff. . . .'

(Emphasis added.)

"For the purposes of section 1703, an 'educational agency' is 'a local educational agency or a "State educational agency" as defined by [20 U.S.C. § 3381(k)].' *Id.* § 1720. Section 3381(k) explains that the 'term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an office or agency designated by the Governor or by the State law.'⁶ And section 1706 permits an 'individual denied an equal

educational opportunity, as defined by this subchapter [to,] institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate.' Thus, the Equal Educational Opportunities Act clearly authorizes desegregation suits against state educational agencies. *See, e.g., United States v. School District of Ferndale*, 577 F.2d 1339, 1347-48 (6th Cir. 1978).

"Since the California State Board of Education and the California State Department of Education fall within the Act's definition of 'state educational agency,'⁷ and Congress, acting under the Fourteenth Amendment, *see* 20 U.S.C. § 1702, explicitly provided for desegregation suits against this type of agency, we hold that the Eleventh Amendment immunity of the California agency defendants has been abrogated." (*L.A. Branch NAACP, supra*, at 950-951; emphasis in original; footnotes omitted.)

1. There Is No Clear And Explicit Statement By Congress In The EEOA To Lift The States' Immunity

Although the Court of Appeals points to some hints that Congress may have intended to lift the States' immunity, those indicia are at best vague and ambiguous. First, the court failed to consider the stated purpose and intent of Congress in enacting the EEOA as stated in 20 U.S.C. § 1702. That section provides, in relevant part, that:

"For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, *except that the provisions of this chapter are not*

intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." (20 U.S.C. § 1702(b); emphasis added.)

There can be no doubt that Congress intended not to diminish the authority or power of the federal courts in desegregation cases under the EEOC. Equally as clear is Congress' intention not to modify the court's power. Applying a plain meaning standard to "modify," one can only conclude that Congress did not intend to increase the scope of authority or power of the federal courts. An abrogation of the Eleventh Amendment for purposes of the EEOA could only be viewed as a modification of federal judicial authority by increasing its power. Section 1702(b) emphatically denies any such intention by Congress.

In considering the EEOA, it appears that Congress desired and intended to bring the States within the prohibitions expressed in 20 U.S.C. § 1703 and to include respondents within the class protected. This situation is not inconsistent with the petitioners' position. Imposing a duty and potential liability on the States while maintaining the States' immunity from private suits is consistent with this court's views in *Employees, supra*. There the court had before it a situation where Congress extended the protection of Fair Labor Standards Act (FLSA) to cover certain State employees pursuant to its power to legislate under the Commerce Clause. (*Id.*, pp. 282-283.) Mr. Justice Douglas, writing for the majority, observed that nothing in the extension of the FLSA to some government employees expressly swept away Eleventh Amendment immunity. Justice Douglas further explained that the FLSA contemplated that most enforcement actions would be brought by the Secretary of Labor on behalf of the

government employees. Hence, there was no necessity to lift state immunity from private suits since actions brought by the federal government against a State are not affected by the Eleventh Amendment. (*Id.*, pp. 282-286.)

Applying the rationale of *Employees* to this case, an identical result should be attained. The means and authority to enforce the EEOA are found in 20 U.S.C. § 1706. That section states:

“An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States *against such parties and for such relief, as may be appropriate.* The Attorney General of the United States (hereinafter in this chapter referred to as the ‘Attorney General’), for or in the name of the United States, may also institute such a civil action on behalf of such an individual.” (20 U.S.C. § 1706; emphasis added.)

Section 1706 allows individuals to bring actions to vindicate their rights only against “appropriate” parties. Nowhere has Congress specified the States as appropriate parties. Section 1706 clearly allows the Attorney General of the United States to bring actions, not to protect the interests of the United States, but to protect the rights of individuals. The authority granted the Attorney General in section 1706 is analogous to that granted the Secretary of Labor under the Fair Labor Standards Act described in *Employees*, *supra*.

Some may argue that the portion of section 1706 which authorizes private suits becomes surplusage under the foregoing analysis. That position is invalid in light of the lack of immunity of local educational entities. In any case not involving State government or in any case involving

both State and local entities, a person falling within the terms of section 1706 may pursue an action against the local defendants, leaving actions against States under the EEOA in the hands of the Attorney General. This situation is consistent with the traditional immunities of the States and is least disruptive of Federal-State relations.

There can be no doubt that Congress knows how to designate the States as appropriate parties since this court's decision in *Fitzpatrick v. Bitzer*, *supra*. In that case, Congress specifically amended Title VII, 42 U.S.C. § 2000(e), to include governments and political entities while repealing a provision which excluded governmental entities from coverage under Title VII. (*Supra*, at 448-449.) Nowhere in the EEOA is there any language similar in clarity to that found in the *Fitzpatrick* case.

There is simply no clear legislative statement in the EEOA indicating Congress' intent to abrogate the States' Constitutional immunity sufficient to meet the standards of clarity and precision required by this court in *Fitzpatrick*, *Employees*, and *Quern*. Section 1702 supplies substantial support to the view that Congress had no intention to modify the relationship of the federal courts to the States. The Court of Appeals appears to have overlooked the plain meaning of section 1702; it certainly did not consider it in its opinion.

2. The Legislative History Of The EEOA Is Silent As To Eleventh Amendment Immunity

To complete the type of analysis used by this court in *Quern*, one would expect that the legislative history of an enactment which is alleged to lift State immunity would address that issue. (*Id.*, 343.) The legislative history of the EEOA is entirely mute on the question of State immunity. (Pub. L. 93-380, 1974 U.S. Code Cong. and Admin. News, pp. 4219-4223.) Moreover, when considering the

decision of the Court of Appeals below, it is important to keep in mind that it reached its holding without any reference to the legislative history of the EEOA.

III

THE COURT OF APPEALS' RELIANCE UPON THE DECISION OF THE SIXTH CIRCUIT IN *FERNDALE* IS INAPPOSITE

The only precedent utilized by the Court of Appeals to buttress its finding that the petitioners were subject to the jurisdiction of the federal courts pursuant to the EEOA is the Sixth Circuit Court of Appeals' decision in *United States v. School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1976) (*L.A. Branch NAACP, supra*, at 591). These two cases are distinguishable.

The *Ferndale* suit was brought by the Attorney General of the United States in the name of the United States pursuant to the authorization in 20 U.S.C. § 1706. (*Supra* at 1343.) The instant action is brought by private associations on behalf of members and the black school children of Los Angeles. (*L.A. Branch NAACP, supra* at 947-948; and *Los Angeles NAACP v. Los Angeles Unified School District*, 518 F.Supp. 1053, 1056.)

No consideration of the principles of State Sovereign immunity are raised or discussed in *Ferndale*. To have done so would have been inappropriate since the question of States sovereign immunity is irrelevant to that case. Since the plaintiff in *Ferndale* was the United States, the prohibitions of the Eleventh Amendment do not affect such suits. The bar of the Eleventh Amendment does not apply to suits by the federal government against one of the United States. *United States v. Mississippi* (1964) 380 U.S. 128, 140-141; *Employees, supra*, at 286.) There was, therefore, no issue of Eleventh Amendment immunity in *Ferndale*. That case is useless as authority to support a

holding that the EEOA abrogates the States' constitutional immunity.

CONCLUSION

Based upon the foregoing argument and authorities, the petitioners submit that the holding of the Ninth Circuit Court of Appeals, that the petitioners are subject to suit under the Equal Education Opportunities Act, is an error. The petitioners respectfully request that the court grant the writ and reverse and vacate the decision in the court below insofar as it determined that the States' Eleventh Amendment immunity from suit is lifted by the provisions of that enactment.

DATED: November 30, 1983.

Respectfully submitted:

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of Education; and Bill Honig, in
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Superintendent of Public Instruction*

APPENDIX

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOS ANGELES BRANCH NAACP, BEVERLY
HILLS-HOLLYWOOD NAACP, SAN PEDRO-
WILMINGTON NAACP, WATTS NAACP, SAN
FERNANDO VALLEY NAACP and CARSON NAACP,

Plaintiffs-Appellants

No. 81-5936

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT,
et al.,

DC# CB 81-
1811-AWT

Defendants,

OPINION

and

CALIFORNIA STATE DEPARTMENT OF
EDUCATION, BILL HONIG, Superintendent
of Public Instruction, in his official
capacity,* and GEORGE DEUKMEJIAN,
Governor, in his official capacity,*

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Wallace A. Tashima, District Judge, Presiding
Argued and Submitted April 5, 1983

Before: ELY, GOODWIN, and SNEED, Circuit Judges

SNEED, Circuit Judge:

*Superintendent Honig and Governor Deukmejian have been substituted for Superintendent Wilson Riles and Governor Edmund G. Brown, Jr., who were named as parties when this suit was brought. Fed. R. App. P. 43(c)(1).

The NAACP brought this class action against the California State Department of Education, the California State Board of Education, the California Superintendent of Public Instruction, and the Governor of California. The NAACP alleged that these state entities and officials, along with a group of local defendants,¹ had created and maintained an unconstitutionally segregated school system in the Los Angeles Unified School District.

The state defendants moved to dismiss the action under Fed. R. Civ. P. 12(b) for lack of jurisdiction and for failure to state a claim on which relief can be granted. The district court granted the motion of the State Department of Education and the State Board of Education, holding that, as state agencies, these defendants were immune from suit in the federal courts under the Eleventh Amendment to the United States Constitution. The district court also dismissed the claims against the Superintendent of Public Instruction and the Governor, but gave the NAACP leave to amend its complaint to allege a case or controversy against these parties sufficient to meet the requirements of Article III. 518 F. Supp. 1053. The district court then dismissed the amended complaints against the Superintendent and the Governor, concluding that the NAACP had failed to establish the existence of a justiciable case or controversy between itself and the Superintendent or Governor. We reverse the dismissal of all claims except for that against the Governor, and hold that suit against the Governor is barred by the Eleventh Amendment.

I.

CASE OR CONTROVERSY

In concluding that no justiciable case or controversy between the NAACP and the Superintendent and Governor was alleged, the district court pointed out that the NAACP had failed to assert in its original and amended complaints

any intentional act on the part of the Governor and the Superintendent of Public Instruction which proximately contributed to school segregation, or to suggest specific remedies which could be ordered against them. The State Board of Education and the Department of Education also argue that the claims against them should have been dismissed on the same grounds. We disagree and hold that the NAACP has alleged a justiciable case or controversy against each of the state defendants.

Under the case or controversy requirement of Article III, the parties seeking to invoke the court's jurisdiction must show that they personally have "suffered some actual or threatened injury as the result of putatively legal conduct of the defendant . . . , and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted).

Our reading of the NAACP's first amended complaint reveals that the NAACP alleged an actual injury traceable to the actions of the state defendants. According to the NAACP, each of the state defendants engaged in intentional acts which resulted in the *de jure* segregation of the Los Angeles Unified School District, and failed to take positive steps "to eliminate from the public school all vestiges of [that] state-imposed segregation." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971).² Since this suit is a class action brought on behalf of black children eligible to attend the Los Angeles schools, who would be directly affected by the state defendants' actions if this allegation is later supported by facts, the complaint is sufficient to meet the "causation" element of the case or controversy requirement. *See, e.g., Davis v. Board of Education of North Little Rock*, 674

F.2d 684, 689 (8th Cir.), *cert. denied*, 103 S. Ct. 178 (1982) (a victim of past *de jure* school segregation alleges a justiciable case or controversy as long as a unitary system of education has not yet been achieved); *Ybarra v. City of San Jose*, 503 F.2d 1041, 1044 (9th Cir. 1974).

The state defendants argue, however, that even if they engaged in *de jure* segregation in the past, they are now without power to remedy any segregation still existing in the Los Angeles schools, because the responsibility for school desegregation in California rests with the local school boards. The issue is a difficult one but we believe the NAACP has the better of the argument.

First, while it appears that the local school boards retain the primary responsibility for desegregation of the public schools, California law does allocate a role to each of the state defendants in achieving and maintaining desegregated schools. *See San Francisco NAACP v. San Francisco Unified School District*, 484 F. Supp. 657, 662-68 (N.D. Cal. 1979) (detailing sources in California law for the responsibility of the State Board of Education, State Department of Education, and Superintendent of Public Instruction in achieving school desegregation); *Tinsley v. Palo Alto Unified School District*, 91 Cal. App. 3d 871, 154 Cal. Rptr. 591 (1979) (desegregation is the responsibility of state officials in California).³ There exists, we believe, a "substantial likelihood" that, should unlawful segregation be found here, the district court could formulate a remedy in which the state defendants could participate. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 (1978).

As already indicated, the state defendants err in their assumption that a justiciable case or controversy can only be raised in this case against the local educational authorities that have heretofore been accorded primary

responsibility for desegregation. The crux of the NAACP's complaint is not that the state defendants should supersede the role of the local educational authorities in school desegregation, but that, under the facts of this case, the state defendants should share with the local authorities the duty of taking affirmative steps to remedy continuing unlawful segregation. Whether this claim has merit is for the district court to decide on remand. What is clear is that such a claim, raised by a class of plaintiffs who allege an injury directly traceable to the defendants' actions, gives rise to a case or controversy sufficient to meet the requirements of Article III. *See O'Shea v. Littleton*, 414 U.S. 488, 495-98 (1974).

II.

ELEVENTH AMENDMENT

A. State Department of Education and State Board of Education

Identical treatment of each of the state defendants, however, is not possible under the Eleventh Amendment. That Amendment bars a suit against a state and its agencies and instrumentalities unless the state has consented to the filing of the suit. *Quern v. Jordan*, 440 U.S. 332, 339-40 (1979); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978); *Jackson v. Hayakawa*, 682 F.2d 1344, 1349-50 (9th Cir. 1982); *see generally* 1979 Duke L. J. 1042. Focusing on the State Department of Education and the State Board of Education initially, we agree with the district court's characterization of them as state agencies. The district court also held that the Eleventh Amendment barred this suit against them, relying on *Alabama v. Pugh, supra*. The NAACP argues, however, that the Eleventh Amendment does not apply here because Congress has abrogated the Eleventh Amendment immunity of state educational agencies in desegregation cases.⁴ We agree

with the NAACP and on this part company with the district court.

Eleventh Amendment immunity can be waived by the state, or by Congress acting pursuant to its enforcement powers under section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). All admit that California has not waived its immunity in the present case, but the NAACP argues that Congress abrogated California's immunity from suit in desegregation cases by enacting 20 U.S.C. §§ 1701-1758, 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983. The NAACP's argument regarding the latter three statutes is without merit, but with respect to 20 U.S.C. §§ 1701-1758 the situation is different.

State immunity under the Eleventh Amendment "will be considered abrogated . . . only when the statute or its legislative history clearly indicates a Congressional intention to abrogate that immunity." *V.O. Motors, Inc. v. California State Board of Equalization*, 691 F.2d 871, 872 (9th Cir. 1982). Neither 28 U.S.C. § 1331, nor § 1343, nor 42 U.S.C. § 1983 contains an expression of Congressional intent to abrogate California's immunity. Therefore none operates to lift the Eleventh Amendment bar. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 342 (1979) (Eleventh Amendment immunity not abrogated by § 1983); *Corbean v. Xenia City Board of Education*, 366 F.2d 480, 481 (6th Cir. 1966), cert. denied, 385 U.S. 1041 (1967) (§ 1343); *Bailey v. Ohio State University*, 487 F. Supp. 601, 606 (S.D. Ohio 1980) (§ 1331);⁵ see generally Note, 68 Va. L. Rev. 865 (1982).

The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758, involves a very different analysis. 20 U.S.C. § 1703 provides, in part, that:

No State shall deny equal educational opportunity to an individual on account of his or her race,

color, sex, or national origin, by (a) the deliberate segregation by an *educational agency* of students on the basis of race, color, or national origin among or within schools; (b) the failure of an *educational agency* which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system; . . . (d) discrimination by an *educational agency* on the basis of race, color, or national origin in the employment conditions, or assignment to schools of its faculty, or staff
(emphasis added)

For the purposes of section 1703, an "educational agency" is "a local educational agency or a 'State educational agency' as defined by [20 U.S.C. § 3381(k)]." *Id.* § 1720. Section 3381(k) explains that the "term 'State educational agency' means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law."⁶ And section 1706 permits an "individual denied an equal educational opportunity, as defined by this subchapter [, to] institute a civil action in an appropriate district court of the United States against such parties, and for such relief as may be appropriate." Thus, the Equal Educational Opportunities Act clearly authorizes desegregation suits against state educational agencies. *See, e.g., United States v. School District of Ferndale*, 577 F.2d 1339, 1347-48 (6th Cir. 1978).

Since the California State Board of Education and the California State Department of Education fall within the Act's definition of "state educational agency,"⁷ and Congress, acting under the Fourteenth Amendment, *see* 20 U.S.C. § 1702, explicitly provided for desegregation

suits against this type of agency, we hold that the Eleventh Amendment immunity of the California agency defendants has been abrogated.

The state defendants do not dispute our reading of the Equal Educational Opportunities Act. Instead they point out that the NAACP failed to plead in its original and amended complaints that Eleventh Amendment immunity could be waived, and that the Act provides a basis for waiver in this suit.⁸ The state defendants contend that the NAACP should be barred from presenting its waiver argument for the first time on appeal.

We disagree. A party's failure to present in its complaint the specific basis for federal jurisdiction "is not fatal [when] the facts alleged are sufficient to support such jurisdiction." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70 n.14 (1978) (allowing § 1331 jurisdiction even though that basis for jurisdiction was not pleaded below). "Defective allegations of jurisdiction may be amended . . . in the . . . appellate courts." 28 U.S.C. § 1653. Since the NAACP's complaint unquestionably raises sufficient facts to provide for a complaint under the jurisdictional section of the Equal Educational Opportunities Act, 20 U.S.C. § 1706, we hold that the Act may be pleaded here for the first time on appeal, and that the waiver argument therefore was properly presented here even though the NAACP failed to advance it below. *Cf. Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (an Eleventh Amendment defense is jurisdictional in nature and can be raised for the first time on appeal, even where the state conceded jurisdiction below).

B. Superintendent of Public Instruction and Governor

Our analysis proceeds differently with respect to the Superintendent of Public Instruction and the Governor even though Eleventh Amendment concerns are also

implicated in actions against state officials sued in their official capacities. Such actions are, in essence, brought against the state entity of which the officer is an agent. See *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982). The Eleventh Amendment bars such actions in the absence of a waiver. But "the Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief." *Id.* See *Ex Parte Young*, 209 U.S. 123, 155-56 (1908). No waiver is required.

The NAACP claims that, since it seeks only declaratory and injunctive relief against the Superintendent and the Governor acting in their official capacities, no Eleventh Amendment immunity bars their suit. The Superintendent and Governor do not dispute the applicability of the *Ex Parte Young* doctrine to them in the abstract. They contend, however, that here it is inapplicable. The Superintendent asserts that he is immune because a judgment in favor of the NAACP would require the payment of funds from the state treasury. The Superintendent then joins the Governor in arguing that the Eleventh Amendment should protect them because there is insufficient connection between them and the relief that the NAACP hopes to obtain.

The Superintendent's first argument is without merit. The NAACP does not seek retrospective damages from the Superintendent, and thus does not contravene the Eleventh Amendment bar against such actions. See *Edelman v. Jordan*, 415 U.S. 651 (1974). That the issuance of an injunction against the Superintendent would make it more likely that California would have to spend money from the State treasury than if he had been left to pursue his previous course of conduct does not affect the type of relief available to the NAACP here. *Id.* at 668.

The Superintendent's second argument, as applied to him, is equally without merit. The Supreme Court explained in *Ex Parte Young*, 209 U.S. at 157, that:

In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

(Emphasis added). See *Southern Pacific Transportation Co. v. Brown*, 651 F.2d 613, 615 (9th Cir. 1980). It is clear that the Superintendent does have a connection with the unconstitutional acts alleged by the NAACP which is sufficient to meet the requirements of *Ex Parte Young*. According to the NAACP, past superintendents helped to authorize and maintain a racially segregated school system in Los Angeles. First Amended Complaint at 11-12. Also, the Superintendent allegedly has not attempted to remedy this segregation, even though the Superintendent has a duty to do so under California law, since he is the secretary and executive officer of the State Board of Education, Cal. Educ. Code § 33004, and it is the policy of the Board "to adopt procedures for the orderly implementation of the obligation of districts to alleviate racial and ethnic segregation of minority students." 5 Cal. Admin. Code § 91(b). See *San Francisco NAACP v. San Francisco Unified School District*, 484 F. Supp. 657, 662-67 (N.D. Cal. 1979).

However, our rejection of the Superintendent's arguments against the application of *Ex Parte Young* is, as to him, redundant. As already pointed out, the Equal Educational Opportunities Act abrogates any immunity he might have

thought he possessed. Our discussion of *Ex Parte Young*, however, is particularly relevant to the Governor.

The Governor's connection with the unconstitutional acts alleged in the NAACP's complaint is much more tenuous than that of the Superintendent. California law does not allocate to the Governor a role in combating racial school segregation, although he does have a constitutional duty to see that the laws of the state are faithfully executed. Cal. Const. Art. V, § 1. Nor is he an "educational agency" within the meaning of the Equal Educational Opportunities Act.⁹

The question then arises whether a general obligation to enforce state law satisfies the *Ex Parte Young* "connection" requirements. This issue has been a subject of much disagreement. Compare, e.g., *Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665-66 n.5 (6th Cir. 1982), *aff'd* 496 F. Supp. 408, 424-27 (S.D. Ohio 1980) (general duty to enforce laws is sufficient connection), with, e.g., *Shell Oil Co. v. Noel*, 608 F.2d 208, 211-12 (1st Cir. 1979) (general duty is not enough; of critical importance are nature of state and officer's connection to statute). However, these and related cases involve a threat by a state official to enforce an allegedly unconstitutional statute then in force in the state. See generally *NAACP v. California*, 511 F. Supp. 1244 (E.D. Cal. 1981), *aff'd*, No. 81-4216 (9th Cir. May 31, 1983).

In the present case, in contrast, the NAACP does not seek to enjoin the Governor from enforcing existing unconstitutional state laws which provide for *de jure* segregation of the Los Angeles schools. Instead, the NAACP hopes to require the Governor to take affirmative steps to eliminate the effects of laws long since repealed. But, as the NAACP admits, the Governor's powers in this area are limited to making general policy and budget recommendations, as well as administrative appointments.

First Amended Complaint at 12. It is obvious, therefore, that the purpose of joining the Governor as a defendant in this suit is not to remedy the effects of unconstitutional segregation since the Governor lacks the power to do so, but to use the Governor as a surrogate for the state, and thereby to evade the state's Eleventh Amendment immunity. This the NAACP cannot do. *See Ex Parte Young*, 209 U.S. at 157.

Thus, the Governor's general duty to enforce California law under the circumstances of this case does not establish the requisite connection between him and the unconstitutional acts alleged by the NAACP. Because of this, and the failure of Congress to waive the Governor's immunity under its Fourteenth Amendment powers, we hold that the Eleventh Amendment bars this suit against the Governor.

REVERSED AND REMANDED.

FOOTNOTES

¹The local defendants, the Los Angeles Unified School District, the Board of Education of the City of Los Angeles, and the Los Angeles Superintendent of Schools, moved for summary judgment on the ground that the suit against them was barred by the adjudication of an identical claim in *Crawford v. Board of Education* (Superior Court of Los Angeles County No. C822854). The district court denied the motion, 518 F. Supp. 1053, 1056-60, and certified an interlocutory appeal separate from the present appeal.

²According to the First Amended Complaint, the Los Angeles schools were segregated *de jure* from 1863 until as late as 1947 under state laws fostered and administered by the state defendants, and the state defendants did not take affirmative steps to eliminate the effects of this segregation. Indeed, the NAACP claims that the state defendants helped to perpetuate past *de jure* segregation by their policies of school construction and renovation, setting boundaries and attendance zones, hiring and promoting faculty, busing, disregarding federal laws and regulations, seeking federal funds for segregated schools, certifying segregated schools, failing to urge the adoption of legislation to dismantle a dual school system in Los Angeles, and recommending budgets which were inadequate to remove the effects of school segregation. First Amended Complaint at 15-19, 23-25.

³The Superintendent of Public Instruction, in addition to his other duties, Cal. Educ. Code §§ 33110-33190, is the secretary and executive officer of the State Board of Education, *id.* § 33004, as well as the executive officer of the Department of Education. *Id.* §§ 33302-33303.

Also, it should be noted that the Governor was not a party to either of the cases cited above, and the Governor's responsibility for school desegregation under California law appears to extend only to his power to sign or veto legislation, formulate general state policies, and appoint state administrative officials, *see Appellants' Opening Brief* at 16-17, as well as to his duty to execute the laws of the state. *See NAACP v. California*, 511 F. Supp. 1244, 1262 (E.D. Cal. 1981), *aff'd*, No. 81-4216 (9th Cir. May 31, 1983). The Governor argues that his duties, unlike those of the state educational authorities, do not give him responsibility for school desegregation, and that he would be unable to remedy any *de jure* segregation in the Los Angeles schools. The NAACP replies that the Supreme Court has approved, at least by implication, the joining of a governor as a defendant in a desegregation suit. *See Milliken v. Bradley*, 418 U.S. 717, 722 (1974). We need not ask the district court on remand to find whether these powers and duties are sufficient to raise a justiciable case or controversy against

the Governor in this case, however, since we hold below that he is immune from suit here under the Eleventh Amendment.

⁴The NAACP also contends that *Pugh* does not apply to school desegregation cases, citing, inter alia, to *Milliken v. Bradley*, 418 U.S. 717, 722 (1974), in which the named defendants included several state officers and the State Board of Education. We disagree. *Pugh* was decided after *Milliken v. Bradley*, and holds that a suit for injunctive relief against a state agency in a civil rights action is barred by the Eleventh Amendment. That *Pugh* was a short per curiam decision does not detract from its validity. Moreover, the relevant passage in *Pugh* was cited with approval by the Court in *Quern v. Jordan*, 440 U.S. 332, 340 (1979). See also *V.O. Motors, Inc. v. California State Board of Equalization*, 691 F.2d 871, 872 (9th Cir. 1982).

⁵The NAACP also contends that the Fourteenth Amendment, without more, abrogates Eleventh Amendment immunity. This argument is without merit. Congress must act affirmatively under its Fourteenth Amendment powers to waive Eleventh Amendment immunity. See *Jagnandan v. Giles*, 538 F.2d 1166, 1182-85 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977); see also *Ex parte Young*, 209 U.S. 123, 150 (1908).

⁶20 U.S.C. § 3381(k) includes every state agency or officer empowered by state law to enforce compliance in the public schools with the requirements of the Act and the Fourteenth Amendment and not merely the single state entity primarily responsible for state supervision of the public schools. See *Idaho Migrant Council v. Board of Education*, 647 F.2d 69 (9th Cir. 1981) (state board of education, department of education, and superintendent of public instruction are subsumed in section 3381(k)).

⁷As we note above, both the State Board of Education and the State Department of Education are empowered under California law to help remedy past *de jure* segregation.

⁸The NAACP pleaded 28 U.S.C. §§ 1131 and 1343, as well as 42 U.S.C. § 1983, but neglected to plead the Equal Educational Opportunities Act.

⁹The Equal Educational Opportunities Act does not waive the immunity of a Governor, only that of state educational agencies and officials. See 20 U.S.C. § 3381(k). No other statute waives the Governor's immunity here.

APPENDIX II

During the relevant period the Constitution of the United States and Statutes provided:

1. Eleventh Amendment to the Constitution of the United States:

“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

2. Title 20, United States Code, section 1701 through 1758, inclusive:

“ § 1701. Congressional declaration of policy

(a) The Congress declares it to be the policy of the United States that—

- (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
- (2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.”

"§ 1702. Congressional findings; necessity for Congress to specify appropriate remedies for elimination of dual school systems without affecting judicial enforcements of fifth and fourteenth amendments

(a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to school solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amount of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States."

"§ 1703. Denial of equal educational opportunity prohibited

No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a

greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

"§ 1704. Balance not required

The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws."

"§ 1705. Assignment on neighborhood basis not denial of equal educational opportunity

Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the

appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin, or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis."

"§ 1706. Civil actions by individuals denied equal educational opportunities or by Attorney General

An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual."

"§ 1707. Population changes without effect, per se, on school population changes

When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, such school population changes so occurring shall not, per se, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan."

"§ 1708. Jurisdiction of district courts

The appropriate district court of the United States shall have and exercise jurisdiction of proceedings instituted under section 1706 of this title."

"§ 1709. Intervention by Attorney General

Whenever a civil action is instituted under section 1706 of this title by an individual, the Attorney General may intervene in such action upon timely application."

"§ 1710. Civil actions by Attorney General; notice of violations; certification respecting undertaking appropriate remedial action

The Attorney General shall not institute a civil action under section 1706 of this title before he—

(a) gives to the appropriate educational agency notice of the condition or conditions which, in his judgment, constitute a violation of part 2 of this subchapter; and

(b) certifies to the appropriate district court of the United States that he is satisfied that such educational agency has not, within a reasonable time after such notice, undertaken appropriate remedial action."

"§ 1712. Formulating remedies; applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."

"§ 1713. Priority of remedies

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools, or

(g) the development and implementation of any other plan which is educationally sound and adminis-

tratively feasible, subject to the provisions of section 1714 and 1715 of this title."

"§ 1714. Transportation of students

Limitation to school closest or next closest to place of students' residence

(a) No court, department, or agency of the United States shall, pursuant to section 1714 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

Health risks; impingement on educational process

(b) No court, department, or agency of the United States shall require directly or indirectly the transportation of any student if such transportation poses a risk to the health of such student or constitutes a significant impingement on the educational process with respect to such student.

School population changes resulting from population changes

(c) When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, no educational agency because of such shifts shall be required by any court, department, or agency of the United States to formulate, or implement any new desegregation plan, or modify or implement any modification of the court approved desegregation plan, which would require transportation of students to compensate wholly or in part for such shifts in school population so occurring."

"§ 1715. District lines

In the formulation of remedies under section 1712 or 1713 of this title the lines drawn by a State, subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn for the purpose, and had the effect, of segregating children among public schools on the basis of race, color, sex, or national origin."

"§ 1716. Voluntary adoption of remedies

Nothing in this subchapter prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this subchapter nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this subchapter, if such plan is voluntarily proposed by the appropriate educational agency."

"§ 1717. Reopening proceedings

A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, or an educational agency subject to a court order or a desegregation plan under Title VI of the Civil Rights Act of 1964 in effect on August 21, 1974, and intended to end segregation of students on the basis of race, color, or national origin, may seek to reopen or intervene in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process."

“§ 1718. Limitation on court orders; termination of orders conditioned upon compliance with fifth and fourteenth amendments; statements of basis for termination orders; stay of termination orders

Any court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a denial of the equal protection of the laws may, to the extent of such transportation, be terminated if the court finds the defendant educational agency has satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable, and will continue to be in compliance with the requirements thereof. The court of initial jurisdiction shall state in its order the basis for any decision to terminate an order pursuant to this section, and the termination of any order pursuant to this section shall be stayed pending a final appeal or, in the event no appeal is taken, until the time for any such appeal has expired. No additional order requiring such educational agency to transport students for such purpose shall be entered unless such agency is found not to have satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable.”

“§ 1720. Definitions

For the purposes of this subchapter—

(a) The term “educational agency” means a local educational agency of a “State educational agency” as defined by section 881(k) of this title.

(b) The term “local educational agency” means a local educational agency as defined by section 881(f) of this title.

(c) The term “segregation” means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on

the basis of race, color, sex, or national origin or within a school on the basis of race, color, or national origin.

(d) The term "desegregation" means desegregation as defined by section 2000c(b) of Title 42.

(e) An educational agency shall be deemed to transport a student if any part of the cost of such student's transportation is paid by such agency."

"§ 1721. Separability of provisions

If any provision of this subchapter or of any amendment made by this subchapter, or the application of any such provision to any person or circumstance, is held invalid, the remainder of the provisions of this subchapter and of the amendments made by this subchapter and the application of such provision to other persons or circumstances shall not be affected thereby."

"§ 1751. Prohibition against assignment or transportation of students to overcome racial imbalance

No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance."

"§ 1752. Appeals from federal district court transfer or transportation orders affecting school attendance areas and achieving balancing of students; postponement of federal court orders pending exercise of appellate remedy; expiration of section

Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with

respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on June 30, 1978."

"§ 1753. Uniform rules of evidence requirement

The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States."

"§ 1702. Provisions respecting transportation of pupils to achieve racial balance and judicial power to insure compliance with constitutional standards applicable to entire United States

The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by Title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence or such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States."

"§ 1755. Additional priority of remedies after finding of de jure segregation

Notwithstanding any other provision of law, after June 30, 1974 no court of the United States shall order the implementation of any plan to remedy a finding of de jure segregation which involves the transportation of students, unless the court first finds that all alternative remedies are inadequate."

"§ 1702. Remedies with respect to school district lines

In the formulation of remedies under this chapter the lines drawn by a State subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn, or maintained or crossed for the purpose, and had the effect of segregating children among public schools on the basis of race, color, sex, or national origin, or where it is established that, as a result of discriminatory actions within the school districts, the lines have had the effect of segregating children among public schools on the basis race, color, sex, or national origin."

"§ 1757. Prohibition of forced busing during school year

Congressional findings

(a) The congress finds that—

(1) the forced transportation of elementary and secondary school students in implementation of the constitutional requirement for the desegregation of such schools is controversial and difficult under the best planning and administration; and

(2) the forced transportation of elementary and secondary school students after the commencement of an academic school year is educationally unsound and administratively inefficient.

Student transportation orders incidental to student transfers pursuant to school desegregation plans effective beginning with academic school year

(b) Notwithstanding any other provisions of law, no order of a court, department, or agency of the United States, requiring the transportation of any student incident to the transfer of that student from one elementary or secondary school to another such school in a local educational agency pursuant to a plan requiring such transportation for the racial desegregation of any school in that agency, shall be effective until the beginning of an academic school year.

"Academic school year" defined

(c) For the purpose of this section, the term "academic school year" means, pursuant to regulations promulgated by the Commissioner, the customary beginning of classes for the school year at an elementary or secondary school of a local educational agency for a school year that occurs not more often than once in any twelve-month period.

Orders subject to provisions of section

(d) The provisions of this section apply to any order which was not implemented at the beginning of the 1974-1975 academic year."

"§ 1758. Reasonable time for developing voluntary school desegregation plans following detailed noticed of violations

Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, any order for enforcement of a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a

reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan.”

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405; that on November 30, 1983, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

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Hon. A Wallace Tashima
United States District Judge
Central District of California
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312 North Spring Street
Los Angeles, California 90012

**I declare under penalty of perjury that the foregoing is
true and correct. Executed on November 30, 1983, at
Santa Monica, California.**

Kirk W. Harney
(Original signed)

No. 83-892

Office - Supreme Court, U.S.
FILED
DEC 23 1983
ALEXANDER L. STEVAS,
CLERK

**In the Supreme Court
of the United States**
OCTOBER TERM, 1983

CALIFORNIA STATE DEPARTMENT OF EDUCATION;
CALIFORNIA STATE BOARD OF EDUCATION; AND
BILL HONIG, IN HIS OFFICIAL CAPACITY AS
SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

v.

LOS ANGELES BRANCH NAACP; BEVERLY HILLS-
NAACP; SAN PEDRO-WILMINGTON NAACP; WATTS
NAACP; SAN FERNANDO VALLEY NAACP; AND
CARSON NAACP,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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LOS ANGELES NAACP v. LOS ANGELES UNIFIED SCHOOL

(Cite as 518 F.Supp. 1033 (1981))

**LOS ANGELES NAACP, et
al., Plaintiffs,**

v.

**LOS ANGELES UNIFIED SCHOOL
DISTRICT, et al., Defendants.**

No. CV 81-1811 AWT.

**United States District Court,
C.D. California.**

July 16, 1981.

In school desegregation case brought against school district, district officials and certain state defendants, defendants moved to dismiss. The District Court, Tashima, J., held that: (1) even if there had been a final judgment in school segregation case in state court, doctrine of res judicata did not bar federal action, brought some ten years later, involving segregation in same school district, where multitude of significant events had transpired since date of judgment, giving rise to serious doubts that interest of children then attending school was substantially identical to interests of children who attended it ten years later, so that parties before state court and federal court were not identical; (2) federal district court would not abstain from exercising its jurisdiction in school desegregation case, even though concurrent state desegregation action was pending, where there was no question of inconveniencing parties by distant forum since both fora sat in Los Angeles, judge who had presided over state actions when remedy phase was decided had recently resigned and was replaced by judge new to case, and state action had been pending for 18 years, giving rise to inference that expeditious

resolution of the claims would not necessarily be better served by dismissal of federal case; (3) under the Eleventh Amendment, action must be dismissed as against California State Board of Education and California Department of Education; and (4) no case or controversy existed as between plaintiffs and defendant Governor or superintendent of public instruction, despite general allegation that defendants had created conditions of de jure segregation in schools, where it was not alleged that any intentional act by either Governor or superintendent had ultimately contributed to current segregation in schools and it appeared that plaintiffs sought funding in aid of desegregation, but funding was constitutionally vested in State Legislature.

Order accordingly.

1. Judgment Key Number 634 [See West Publishing Company "West Key Number System," hereinafter referred to as "Key Number."]

Application of res judicata depends on presence of two elements: a final judgment on the merits and identity of parties or their privies.

2. Judgment Key Number 828(3.16)

State decision remanding case to trial court for further proceeding in which possibility of retrial and taking of additional evidence remained open was not a final judgment for res judicata purposes.

3. Judgment Key Number 715(2)

For res judicata purposes, tests for determining whether issues in later case are the same as those in earlier one are whether different judgment in later action would impair rights created pursuant to judgment rendered in the prior action, whether the evidentiary basis of the first and second actions is the same, or whether the essential facts and issues were similarly presented in both cases.

4. Judgment Key Number 828(3.49)

Since state court judge's opinion considered alleged segregation in school district only during one period, even if any of state court decisions were considered final, federal court could decide whether there was segregation several years later without impairing any of rights previously created; thus there was no identity of issues between federal case and the pending state proceeding, rendering res judicata inapplicable. 42 U.S.C.A. § 1983; West's Ann.Cal. Const. Art. 1, § 7(a); U.S.C.A. Const. Amend. 14.

5. Judgment Key Number 828(3.42)

Even if there was final judgment in school segregation case in state court, doctrine of res judicata did not bar federal action, brought some ten years later, involving segregation in same school district, where multitude of significant events had transpired since date of judgment, giving rise to serious doubts that interest of children then attending school was substantially identical to interests of children who attended it ten years later so that parties before state court and federal court were not identical. 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 14.

6. Federal Courts Key Number 62

Since plaintiffs in federal school desegregation case did not seek to enjoin either continuation of state proceeding or enforcement of state statute by state officials and there had never been any state "enforcement" action, so that plaintiffs could not have raised basis for federal relief as complete or partial defense to pending state enforcement action, conditions required for application of *Younger*-type abstention by federal court were not present.

7. Courts Key Number 493(3)

Generally, pendency of action in state court is no bar to proceedings concerning same matter in federal court, and,

while there are circumstances which permit dismissal of federal suit due to presence of concurrent state proceedings, those circumstances are exceptional.

8. Action Key Number 69(3)
Courts Key Number 493(3)

In determining whether stay or dismissal of action in federal court is justified because of concurrent state court proceeding, focus is upon whether exceptional circumstances exist which indicate that concurrent jurisdiction by state and federal courts is likely to cause piecemeal litigation, waste of judicial resources, inconvenience to parties and conflicting results, and other factors to be considered include inconvenience of federal forum and order in which jurisdiction was obtained by concurrent forums, but dismissal is proper only when, in judgments of the federal court, any adverse consequences outweigh in given situation the unflagging obligation of federal courts to exercise jurisdiction given to them.

9. Federal Courts Key Number 62

Federal district court would not abstain from exercising its jurisdiction in school desegregation case, even though concurrent state desegregation action was pending, where there was no question of inconveniencing parties by distant forum since both fora sat in Los Angeles, judge who had presided over state actions when remedy phase was decided had recently resigned and was replaced by judge new to case, and state action had been pending for 18 years, giving rise to inference that expeditious resolution of claims would not necessarily be better served by dismissal of federal case. 42 U.S.C.A. §1983.

10. Federal Courts Key Number 272

Even suits seeking injunctive relief against state agency are barred by the Eleventh Amendment. U.S.C.A. Const. Amend. 11.

11. Federal Courts Key Number 269

Under the Eleventh Amendment, school desegregation action must be dismissed as against California State Board of Education and California Department of Education. U.S.C.A.Const. Amend 11.

12. Federal Courts Key Number 12

Case or controversy requirement of Constitution is jurisdictional. U.S.C.A. Const. Art. 3, § 2, cl.1.

13. Federal Courts Key Number 12

To meet "standing" requirement necessary to give rise to case or controversy, plaintiffs must demonstrate not only injury, but also that there is fairly traceable causal connection between claimed injury and challenged conduct and standing also requires that the prospective relief will remove the harm. U.S.C.A.Const. Art. 3, § 2, cl. 1.

14. Federal Courts Key Number 13

No case or controversy existed as between plaintiffs and defendant Governor or superintendent of public instruction in school desegregation case, despite general allegation that defendants had created conditions of de jure segregation in schools, where it was not alleged that any intentional act by either Governor or superintendent had ultimately contributed to current segregation in schools and it appeared that plaintiffs sought funding in aid of desegregation, but funding was constitutionally vested in state Legislature. U.S.C.A.Const. Art. 3, § 2, cl. 1; Amend. 11; West's Ann. Cal.Const. Art. 9, § § 1,6.

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G. William Shea, Peter W. James, David T. Peterson, Michael M. Johnson, McCutchen, Black, Verleger & Shea, Los Angeles, Cal., Jerry F. Halverson, Los Angeles, Cal., for defendants Los Angeles Unified School District, Board of Education of the City of Los Angeles, William J. Johnston, Superintendent of Schools.

George Deukmejian, Atty. Gen. of Cal., G.R. Overton, Scott Rasmussen, Deputy Attys. Gen., Los Angeles, Cal., for defendants Edmund G. Brown, Jr., Governor of the State of California, California State Board of Education, California Department of Education, Wilson Riles, Superintendent of Public Instruction.

MEMORANDUM OPINION AND ORDER

TASHIMA, District Judge.

In this action against the Los Angeles Unified School District (the "District"), District officials and certain State defendants, the District (or local) defendants have moved to dismiss the action for lack of subject matter jurisdiction, Rule 12(b)(1), Fed.R.Civ.P., and for failure to state a claim on which relief can be granted, Rule 12(b)(6), Fed.R.Civ.P. In the alternative, District defendants move that this Court abstain from exercising its jurisdiction "in view of the pending state court proceeding in *Crawford v. Board of Education* (Los Angeles County Superior Court No. C822854)." The remaining defendants, Governor Edmund G. Brown, Jr., Wilson Riles, Superintendent of Public Instruction, California State Board of Education and California Department of Education (collectively the "State defendants") have also filed motions to dismiss. They join in the local defendants' motion that this Court abstain. Additionally, they assert two grounds peculiar to themselves, Eleventh Amendment immunity and lack of an Article III justiciable controversy.

Although the complaint refers to pendent state claims without alleging what those claims are, the primary claim here is brought under 42 U.S.C. § 1983 for deprivation of constitutional rights. The federal claim alleged is that defendants have instituted and maintained a system of *de jure* segregation in the Los Angeles schools in violation of the Fourteenth and other Amendments of the Constitution. Plaintiff membership associations bring this action on behalf of their members and on behalf of a putative class of all black children attending the Los Angeles City schools.

We first address the grounds on which the local defendants' motion to dismiss is based. These grounds are, first, that this action is barred by the doctrine of res judicata because of prior proceedings in state court and, secondly, that, even if not barred, this Court should abstain from exercising its jurisdiction because of the pendency of ongoing proceedings in state court.

Res Judicata

The District defendants contend that the complaint fails to state a claim and that the action should be dismissed because, under the doctrine of res judicata, the claim here has been previously adjudicated in the California state courts. The judgment pleaded as a bar is the opinion and remittitur¹ of the California Court of Appeal in *Crawford v. Board of Education*, 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980), *petition for cert. filed*, U.S.L.W. (No. 81-38, Jul. 8, 1981) ("*Crawford II*"). Disposition of this contention requires a brief summary of the long history of the state court proceedings.

¹Under California law the remittitur of an appellate court is its final judgment. Rule 25(a), Cal. Rules of Court. It is equivalent to the mandate in federal practice. See Rule 41(a), Fed.R.App.P.

Crawford was commenced in the Los Angeles Superior Court in 1963, shortly after the landmark decision in *Jackson v. Pasadena City School Dist.*, 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (1963). In *Jackson*, the California Supreme Court stated that a school desegregation action stated a cause of action "even in the absence of . . . affirmative discriminatory conduct by the school board," that where segregation exists in fact, "it is not enough for a school board to refrain from affirmative discriminatory conduct," and that "the right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause." *Id.* at 881, 31 Cal.Rptr. 606, 382 P.2d 878. In short, *Jackson* eliminated any practical distinction between *de jure* and *de facto* segregation insofar as it may have affected the right to seek a judicially ordered remedy to school segregation. It is obvious that *Jackson* served as a benchmark in guiding the action of the parties in *Crawford* and the lower courts for 17 of the 18 years during which that action has been pending.

Crawford was originally brought as a class action on behalf of a limited number of black school children, but the class allegations were later amended to include all black and Mexican school children in the District. Although the state courts appear implicitly to have treated the case as a proper class action, nothing in the record here indicates that any hearing was held or any express determination was ever made that the case was properly a class action, that it should proceed as such, that the class sought to be represented was appropriate or that the representatives

were adequate and proper; indeed, there has never been any determination of who the members of the class are.²

The action was bifurcated and liability was tried by the late Judge Alfred T. Gitelson for 65 days between October 1968 and May 1969. By stipulation of the parties, approved by the court, evidence as to liability was limited to the period from the filing of the complaint in 1963 to commencement of trial in 1968. On May 12, 1970, Judge Gitelson filed his findings of fact and conclusions of law, finding in favor of plaintiffs, and issued a peremptory writ of mandate. In his findings, Judge Gitelson found *de jure* segregation.

An appeal was taken and, in 1976, the California Supreme Court modified and affirmed Judge Gitelson's decision. *Crawford v. Board of Education*, 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976) ("*Crawford I*"). Although the court stated that, "The findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is *de jure* in nature," it further stated, "that we do not rest our decision on this characterization because we continue to adhere to our conclusion in *Jackson* that school boards in California bear a constitutional obligation to take reasonably feasible

²The District defendants correctly point out that at the time *Crawford* was filed and through the trial on liability there were no formalized procedures in California akin to Rule 23, Fed.R.Civ.P., for the determination of class issues, although class actions have long been recognized under California law. Cal. Code Civ.Proc. §382 (enacted in 1872); see, e.g., *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732 (1967). On the other hand, implicit in defendants' position is that class membership has remained open-ended throughout the 18 years of the state court litigation and remains open, i.e., as minority children become of school age they are automatically co-opted into the class. The issues raised by this fluid class concept are addressed, *infra*.

steps to alleviate school segregation 'regardless of its cause.' " *Id.* at 285, 130 Cal.Rptr. 724, 551 P.2d 28.³

On remand to the Superior Court, extensive hearings were held commencing in early 1977 with respect to the appropriate remedy. A number of plans were proposed and rejected and in February 1978, an interim plan involving mandatory busing, Plan 2, was ordered to be implemented the following September. While hearings were being conducted on whether or not Plan 2 should be continued in effect, the California electorate approved Proposition 1, an initiative measure on the November 6, 1979, ballot, amending Article I, section 7(a), of the California Constitution. Proposition 1 provided that pupil assignment and pupil transportation were available as remedies under the California Constitution only when such a remedy would be available in federal courts for violation of the Fourteenth Amendment of the United States Constitution. Thus, the effect of Proposition 1 was to nullify *Jackson* and the line of cases following *Jackson* under which pupil assignment and transportation were available remedies for school segregation "regardless of its cause," *i.e.*, whether it was *de jure* or *de facto*.

Shortly after Proposition 1 was adopted, defendants in *Crawford* applied for modification of Plan 2. In 1980, the Superior Court denied the application under Proposition 1 and adopted Plan 3, involving more extensive mandatory pupil assignment than Plan 2, to be implemented in September of that year. The District appealed and on December 19, 1980, the California Court of Appeal, in *Crawford II*, vacated the order adopting Plan 3 and the

³Apparently because no issue with respect to the class aspects of the case was raised, the only reference by the California Supreme Court to any class aspect of the case was the passing statement that, "plaintiffs . . . filed this class action" shortly after *Jackson*. *Id.* 17 Cal.3d at 286, 130 Cal.Rptr. 724, 551 P.2d 28. *Crawford II* also contains no mention of the class aspects of the case.

case was "remanded to the trial court for further proceedings consistent with this opinion." 113 Cal.App.3d at 656, 170 Cal.Rptr. 495. In reviewing the 1970 findings, *Crawford II* first noted that, "the trial court made these deductions and inferences in 1970 at a time it did not have the benefit of the more recent decisions of the United States Supreme Court."⁴ *Id.* at 644, 170 Cal.Rptr. 495. It then concluded that, "When the 1970 findings of the trial court are reviewed in the light of the correct applicable federal law, it is apparent that no specific segregative intent with discriminatory purpose was found." *Id.* at 645, 170 Cal.Rptr. 495. Treating the trial court's findings of *de jure* segregation as a "characterization" and a conclusion of law not binding on an appellate court, *Crawford II* held:

In sum, no federal violation of law was established by the 1970 findings, and the trial court's identification of the then existing racial segregation within the Los Angeles school system as *de jure* segregation was true only in the Pickwickian sense, and was not true at all in the sense of federal law. Because there was no evidence of acts done with specific segregative intent and discriminatory purpose, there was no federal constitutional violation—regardless of the terminology used by the court."

Id. at 646, 170 Cal.Rptr. 495. The California Supreme Court denied a hearing and, as noted earlier, a petition for writ of certiorari is now pending before the United States Supreme Court.

⁴For this reason alone, collateral estoppel is also inapplicable to this case. *Commissioner v. Sunnen*, 333 U.S. 591, 599-602, 68 S.Ct. 715, 720-721, 92 L.Ed. 898 (1948); see also, *Los Angeles Unified School Dist. v. United States Dist. Court*, 650 F.2d 1004 at 1012 (9th Cir. 1981) (Ferguson, J., dissenting) ("Collateral estoppel may not be applied in situations in which intervening modifications in the law create a new legal climate."), and cases cited therein. The same exception also may preclude the application of *res judicata*. *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162, 65 S.Ct. 573, 577, 39 L.Ed. 812 (1945).

[1] As most recently stated by the Supreme Court, "There is little to be added to the doctrine of res judicata as developed in the case law of this court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, _____ U.S. _____, _____, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981). Thus, application of res judicata depends on the presence of two elements: First, a *final* judgment on the merits and, second, identity of parties or their privies. On the record here—the complaint and judicially noticed facts under Rule 201, Fed.R.Evid., of proceedings in *Crawford* as reflected in documents supplied by the parties—I conclude that neither of these requirements has been met.

[2] District defendants contend that the remittitur in *Crawford II* is a final judgment. However, its very words defy characterizing it as *final*. It remands the case to the Superior Court for further proceedings. As recently noted by the Supreme Court in a slightly different but analogous context:

"Under California law, an appellate court reversal of a trial court decision has the effect of vacating the judgment and returning the case to the trial court for a new trial 'as if no judgment had ever been rendered.' See *Erlin v. National Fire Ins. Co.*, 7 Cal.2d 547, 549 [61 P.2d 756] (1936); *Salaman v. Bolt*, 74 Cal.App.3d 907, 914, 141 Cal.Rptr. 841, 844 (1977). Thus, the losing party on appeal may introduce additional evidence. See *Gospel Army v. Los Angeles*, 331 U.S. 543, 547-548, 67 S.Ct. 1428, 1430, 91 L.Ed. 1662, quoting *Erlin*, *supra*. Although this rule regarding new trials does not apply if the appellate court did not intend a new trial, *Stromer v. Browning*, 268 Cal.App.2d 513, 518-519, 74 Cal. Rptr. 155, 158 (1968), such as when the appellate

court decides a dispositive issue which does not turn on facts which might change on retrial, *id.*, at 519; 74 Cal.Rptr., at 160, the Court of Appeal clearly contemplated a possible retrial here."

Minnick v. California Dep't of Corrections, _____ U.S. _____, _____, 101 S.Ct. 2211, 2222-23, 68 L.Ed.2d 706 n.37 (1981) (determination by California Court of Appeal reversing trial court judgment not "final" for purposes of certiorari jurisdiction under 28 U.S.C. § 1257(3)).

In *Crawford*, pursuant to the Court of Appeal's remittitur in *Crawford II*, further proceedings on remand have resumed in the Superior Court. In fact, plaintiffs in *Crawford* have taken the position that they are entitled to reopen or retry the issue of *de jure* segregation. Thus, the possibility of a retrial and the taking of additional evidence remains open; certainly, *Crawford II* does not clearly preclude such a result. There is no final judgment.⁵

⁵Although it is unnecessary to reach the issue, it should be noted that *Crawford II* may not meet the final judgment requirement for another reason. In *Federated Dep't Stores*, *supra*, _____ U.S. at _____, 101 S.Ct. at 2427, while noting its own "rigorous application" of the doctrine, the Supreme Court expressly refused to decide whether res judicata applied to additional state law claims not raised in the prior federal action. *Id.* at _____, 101 S.Ct. at 2429; compare *id.* at _____, 101 S.Ct. at 2429 (Blackmun, J., concurring) ("... in contrast, I would flatly hold that Brown I [the prior action] is res judicata as to respondents state law claims"). In *Crawford II*, the California Supreme Court's opinion in *Crawford I* was interpreted to make clear that the claim in *Crawford* was a state law claim. As stated by the Court of Appeal, in *Crawford I*, "state law was formally severed from federal law, and school boards were placed under an affirmative duty . . . to alleviate segregation . . . regardless of the cause of the segregation. The existence of the duty was derived both from state decisional law and from the equal protection clause in article I, section 7, subdivision (a) of the California Constitution." 113 Cal.App.3d at 651, 170 Cal.Rptr. 495 (citations omitted). *Crawford* is, thus, the converse of *Federated Dep't Stores* — the prior action being a state law claim and the subsequent one federal.

Finally, with respect to this requirement, the District defendants' second basis for this motion makes it plain that no final judgment exists. That basis is that this Court should abstain from exercising its jurisdiction because not to do so would interfere with the pending proceedings in *Crawford*. The rhetorical question which immediately comes to mind is, How can there be a final judgment if the proceedings are still pending? To ask the question is to answer it. *E.g.*, *Federated Dept. Stores, supra*; *Gospel Army v. Los Angeles*, 331 U.S. 543, 67 S.Ct. 1428, 91 L.Ed. 1662 (1947); *McGourkey v. Toledo & Ohio Ry.*, 146 U.S. 536, 545, 13 S.Ct. 170, 172, 36 L.Ed. 1079 (1892); *Beebe v. Russell*, 60 U.S. (19 How.) 283, 15 L.Ed. 668 (1857).

The answer to the second inquiry, identity of parties or their privies, is more easily ascertainable when only individual parties—as opposed to classes—are involved. Here, the problem is even more complicated than in an ordinary class action because the class or classes involved in the prior action have never been defined or determined. The problem arises primarily because under the District defendants' contention there is no end to the size of and membership in the class. Because the state courts have, at best, only implicitly determined that *Crawford* is properly a class action, there has never been any determination as to the time period involved or the date after which those black children coming of school age will no longer automatically become co-opted into the class. It was probably intended by the Superior Court that all black and Mexican school children in the District as of the date its writ of mandate was issued in 1970 be treated as members of the class and bound by the judgment. But should those who have come of school age since then be treated as members of this implicit class? Should black children who have come of school age since *Crawford II*, contended by local defendants to be a final judgment, be treated as

implicit class members? If the answer to either of these questions is in the affirmative, should such school children be barred from litigating claimed *de jure* segregation occurring since 1970 or since 1980?

Because no class was ever formally certified by the trial court in *Crawford*, the scope of the class for res judicata purposes must be determined by implication from Judge Gitelson's 1970 findings of fact and conclusions of law, which were "final" in at least the same sense as *Crawford II* is claimed to be "final". *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979); *Bing v. Roadway Express*, 485 F.2d 441, 447 (5th Cir. 1973). There is no intimation that Judge Gitelson intended to include all future school children within the scope of his order.⁶ Cf. *Johnson, supra*, 598 F.2d at 435 (decree in prior case included all present and future employees subjected to employment discrimination).

[3, 4] The claim to be adjudicated here is whether or not *de jure* segregation exists today in the District schools. The claim adjudicated in *Crawford* was whether or not, based on evidence limited to the 1963-1968 period, segregation existed in the District schools in 1970, when the liability findings were rendered. No other determination of liability has been made in *Crawford*. Because of the difference between these claims,⁷ those putative members

⁶It is doubtful that in 1970, Judge Gitelson expected remedy to still be at issue 11 years later.

⁷Because the claims are different, the issues in this case are not the same as the issues that were before the state trial court in 1970. The test for determining whether claims are duplicative is:

"[W]hether a different judgment in the subsequent action would impair the rights created pursuant to the judgment rendered in the prior action; whether the evidentiary basis of the first and second actions is the same, or whether the essential facts and issues were similarly presented in both cases."

Footnote continued following page

of the class here who were not of school age on May 12, 1970, the date of Judge Gitelson's findings of fact, but are of school age at this time are not similarly situated to the children who were of school age at the earlier date. For res judicata purposes, then, the class now before the state court includes only those children who were class members in 1970.⁸ Conversely, children who have entered the school system since that time are not members of that class, and not barred by res judicata from asserting their rights here.

[5] The doctrine of virtual representation, adopted by some courts, is not applicable to this situation. "Generally speaking, one whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, although not formally a party to the litigation." *Expert Electric, supra*, 554 F.2d at 1233; *Aerojet General Corp. v. Askew*, 511 F.2d 710, 719 (5th

Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1234 (2d Cir.), cert denied, 434 U.S. 903, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977) (citations omitted). Judge Gitelson's 1970 opinion considered the defendants' conduct only during the period from 1963 to 1968; and he reached the determination that the schools were segregated as of the time that the liability trial concluded. *Crawford I, supra*, 17 Cal.3d at 288, 130 Cal.Rptr. 724, 551 P.2d 28. No new liability findings have been rendered since that time. Accordingly, even if any of the state court decisions are considered final, this Court may decide whether there is segregation in 1981 without impairing any of the rights created in any of the previous liability "judgments." Plaintiffs here allege a continuing course of conduct on defendants' part, including acts which both ante date and post date the 1963-1968 period considered by Judge Gitelson. I, therefore, find that the claims are not the same and that there is no identity of issues between this case and the pending state proceeding. This, of course, constitutes an independent ground for the inapplicability of res judicata.

⁸Although *Crawford II*, contended by the local defendants to be a final judgment, was not decided until 1980, it merely reversed Judge Gitelson's 1970 findings of *de jure* segregation and, therefore, did not alter the class.

Cir.), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975). *See also*, *Garcia v. Board of Education, School District No. 1*, 573 F.2d 676, 680 (10th Cir. 1978). The multitude of significant events that have transpired since 1970 give rise to serious doubts that the interests of the children who are now attending school are substantially identical to the interests of the children who were attending school in 1970. Only the latter interests were presented and pursued before Judge Gitelson, and it would be a denial of due process to bar those children who have since come of age from pursuing their own interests before this Court.

If there was a final judgment, then, the parties in *Crawford* and before this Court are not identical.⁹

For these reasons, it is concluded that the doctrine of res judicata is inapplicable on the record here.

Abstention

The District defendants next contend that this Court should abstain from exercising its jurisdiction and dismiss the action. They are joined in this contention by the State defendants. Defendants rely on *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny, particularly *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979).

The law regarding abstention was recently reviewed and restated in *L. H. v. Jamieson*, 643 F.2d 1351 (9th Cir. 1981) (*per curiam*). In that case the court canvassed all of the applicable Supreme Court cases and concluded:

"*Younger* and its progeny share two principal characteristics: (1) the plaintiffs sought to enjoin continuation of a state proceeding or sought to enjoin material

⁹It requires no discussion to conclude that they also are not privies in any legal sense. *See* Restatement of Judgments §83.

state officials from enforcing a state statute, and (2) the basis for federal relief could have been raised as a complete or partial defense to a pending or ongoing state enforcement action during the normal course of the state proceeding. When these two characteristics are present, the argument for employing equitable restraint is compelling

"When these characteristics are not present, however, the Supreme Court has refused to find the *Younger* concerns sufficiently compelling to warrant federal equitable restraint, even where a plaintiff could have raised his claim in a pending state proceeding."

Id. at 1352-54 (footnotes and citations omitted).

[6] Neither of the conditions required for the application of *Younger*-type abstention is present here. Plaintiffs do not seek to enjoin either continuation of a state proceeding or the enforcement of a state statute by state officials. Since there is or never has been any state "enforcement" action, plaintiffs could not have raised the basis for federal relief here as a complete or partial defense to such a pending state enforcement action.

Under *L. H. v. Jamieson, supra*, the most recent and controlling Ninth Circuit authority, *Younger*-type abstention is inapplicable.

Colorado River Dismissal

The next ground for dismissal raised by the District defendants and joined in by the State defendants is that this action should be dismissed in order to avoid duplicative litigation. Defendants primarily rely on *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), in which the Supreme Court held that a federal court may dismiss a

case involving a question of federal law where a concurrent state action is pending in which the identical issues are raised.

The lower federal courts have long held that a federal district court has the power to stay an action where there is a pending state action presenting the same issues in order to foster the interests of judicial administration: comprehensive disposition of litigation, conservation of judicial resources; and fairness to parties. *E.g.*, *Weber v. Consumer's Digest, Inc.*, 440 F.2d 729 (7th Cir. 1971); *Klein v. Walston & Co., Inc.*, 432 F.2d 936 (2d Cir. 1970) (*per curiam*); *Amdur v. Lizars*, 372 F.2d 103 (4th Cir. 1967); *Lear Siegler, Inc. v. Adkins*, 330 F.2d 595 (9th Cir. 1964); *Milk Drivers and Dairy Employees Union v. Dairymen's League Co-op. Ass'n*, 304 F.2d 913 (2d Cir. 1962); *Beiersdorf & Co., Inc. v. McGohey*, 187 F.2d 14 (2d Cir. 1951); *Mottolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949).

[7] In *Colorado River*, the Court articulated the controlling legal standard justifying the stay or dismissal of an action in federal court because of a concurrent state court proceeding, even though federal jurisdiction is properly invoked.¹⁰ The general rule is that the pendency of an

¹⁰In *Colorado River*, the Court also analogized to cases involving disputes over the disposition of specific property, in which the court first obtaining jurisdiction over the property may exercise its jurisdiction to the exclusion of other courts, citing, *inter alia*, *Princess Lida v. Thompson*, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1939); *United States v. Bank of New York Co.*, 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331 (1936). Because "there is only one Los Angeles Unified School District," the District defendants contend that this action should be dismissed because the state courts first obtained jurisdiction over the District. This is not a dispute over the disposition of property and direct application of any analogy to probate or trust or corporate liquidation proceedings is completely inapposite.

action in state court is no bar to proceedings concerning the same matter in federal court. *McClellan v. Carland*, 217 U.S. 268, 282, 30 S.Ct. 501, 504, 54 L.Ed. 762 (1910); see *Donovan v. City of Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964). While there are circumstances which permit dismissal of a federal suit due to the presence of concurrent state proceedings, these circumstances are exceptional. *Colorado River, supra*, 424 U.S. at 817-18, 96 S.Ct. at 1246.

[8] Thus, the focus under *Colorado River* is "upon whether exceptional circumstances exist which indicate that concurrent jurisdiction by state and federal courts is likely to cause piecemeal litigation, waste of judicial resources, inconvenience to the parties, and conflicting results." *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1980). Other factors to be considered include the inconvenience of the federal forum and the order in which jurisdiction was obtained by the concurrent forums. *Colorado River, supra*, 424 U.S. at 818, 96 S.Ct. at 1246.

Dismissal, however, is proper only when, in the judgment of the court, any adverse consequences outweigh in a given situation the "unflagging obligation" of the federal courts to exercise the jurisdiction given to them. *Id.* at 817-18, 96 S.Ct. at 1246; *Tovar v. Billmeyer, supra*, 609 F.2d at 1293. "No one factor is necessarily determinative; a carefully considered judgment, taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise, is required." *Id.* It should also be noted that in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 663-64, 98 S.Ct. 2552, 2557-58, 57 L.Ed.2d 504 (1978) (plurality opinion), a case subsequent to *Colorado River*, the Supreme Court held that the decision whether to defer to the concurrent jurisdiction of a state court is a matter committed to the district court's discretion.

In *Tovar v. Billmeyer, supra*, the Ninth Circuit indicated that in cases where the plaintiffs assert a right to relief under 42 U.S.C. § 1983, the obligation of the federal courts to exercise the jurisdiction given to them is "particularly weighty." 609 F.2d at 1293. The Court stated:

"Under such circumstances conflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to the federal relief § 1983 assures. While we need not conjecture whether there exist circumstances that could outweigh the 'unflagging obligation' in section 1983 cases, we are convinced that they do not exist in this case."

Id.

[9] As in *Tovar v. Billmeyer, supra*, the circumstances here militate against deference to pending state court proceedings. First, there is no exceptional circumstance, such as the McCarran Amendment, 43 U.S.C. § 666, which *Colorado River* found embodied a clear federal policy of avoiding the piecemeal adjudication of water rights in a river system. 424 U.S. at 819, 96 S.Ct. at 1247. On the contrary, § 1983 evinces a strong congressional policy of providing a federal forum to those alleging a violation of their rights under the United States Constitution. See *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Tovar v. Billmeyer, supra*, 609 F.2d at 1293. Second, there is no question of inconveniencing the parties by a distant forum since both fora sit in Los Angeles. Third, although *Crawford* was filed long before this action, the able trial judge who presided over *Crawford's* remedy phase since *Crawford I* was decided has recently resigned and was replaced only this year by a judge who is new to the case. Finally, the fact that *Crawford* has been pending in the state courts for 18 years is a factor which militates in favor of this Court's

exercising its "unflagging obligation" rather than abstaining from it. This circumstance gives rise to the inference that the expeditious resolution of the claims made in these two cases will not necessarily be better served by dismissal of this case in deference to *Crawford*. Despite its long history, *Crawford's* ultimate resolution is far from clear. As stated earlier, *Crawford II's* remittitur may permit, if not require, a retrial of the liability phase, because of changes in the law in the 11 years since Judge Gitelson issued the writ of mandate. On such a retrial or reopening of liability, plaintiffs may seek to be relieved of their stipulation to limit evidence on liability to the five-year period from 1963-1968.¹¹

Based on all the circumstances, I conclude that dismissal of this case under *Colorado River* would be inappropriate. I, therefore, decline to dismiss this case in deference to *Crawford*.¹²

The Eleventh Amendment

We turn now in this and the succeeding sections to the two additional grounds raised by the State defendants for dismissal of this action against them. As stated earlier, the State defendants include Governor Edmund G. Brown, Jr., Wilson Riles, the Superintendent of Public Instruction, the California State Board of Education and the California Department of Education.

¹¹If this action is dismissed and if such reopening and relief are not sought or not permitted, plaintiffs here will have been deprived of the opportunity to have their constitutional claims fully presented.

¹²Nothing in *Colorado River* indicates that a declination to dismiss in deference to a state court proceeding at this early stage of the case is not subject to reconsideration upon a showing of changed circumstances. Obviously, a determination not to exercise a *Colorado River* dismissal can be based only on the circumstances as they now exist.

[10] All of the State defendants contend that this action is barred by the Eleventh Amendment of the Constitution. It would serve no purpose to set forth here the history of the development of Eleventh Amendment immunity since *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). That task has recently been most ably performed by Judge Schwartz in a related case, *NAACP v. California*, 511 F.Supp. 1244, 1249-59 (E.D.Cal. 1981). As Judge Schwartz noted, with respect to suits against a state agency, *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (*per curiam*), remains controlling and under its flat ruling, even suits seeking only injunctive relief against a state agency are barred by the Eleventh Amendment. *See also, Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977), *rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) (involving bistate agency created by interstate compact).

[11] Under the Eleventh Amendment, therefore, this action must be dismissed as against defendants California State Board of Education and California Department of Education.¹³

¹³Because the case or controversy requirement, *infra*, is dispositive as to them and because other factors not now before the Court may require consideration if an amended complaint is filed as to them and the Eleventh Amendment is again raised as a bar, it is unnecessary to and the Court declines to reach the Eleventh Amendment issues with respect to defendants Governor Brown and Superintendent Riles at this time.

Case or Controversy

[12,13] It has long been held that the "case or controversy" requirement of Article III of the Constitution is jurisdictional. *E.g., Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); see *NAACP v. California*, *supra*, 511 F.Supp. at 1259-63. To meet the "standing" requirement necessary to give rise to a case or controversy, plaintiffs must demonstrate not only injury, but also that there is a "fairly traceable" causal connection between the claimed injury and the challenged conduct." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976); *Nat'l Wildlife Fed'n v. Adams*, 629 F.2d 587, 594 n.11 (9th Cir. 1980). Standing also requires that the "prospective relief will remove the harm." *Warth v. Seldin*, *supra*, 422 U.S. at 505, 95 S.Ct. at 2208.

In this action alleging generally that defendants have created the conditions of *de jure* segregation in the Los Angeles schools, nowhere in the complaint is there any allegation of any intentional act by either the Governor or Superintendent of Public Instruction which proximately contributed to the current segregated state of the schools. In fact, the only mention of the Governor anywhere in the complaint is the allegation that the members of the State Board of Education are appointed by the Governor.

Plaintiffs were unable to answer at oral argument what specific relief, if any, could be ordered against these defendants, were plaintiffs to prevail at trial. In fact, plaintiffs' written opposition to the State defendants' motion to dismiss is tantamount to an admission that no case or controversy exists:

"Contrary to the assumption of the state defendants, which is incorporated as a premise to their Article III dismissal motion, plaintiffs would not immediately proceed to preliminarily enjoin the described *future* conduct of state defendants (e.g. reduction of appropriations in aid of desegregation) until that conduct was clearly and manifestly threatening irreparable injury to plaintiffs' class."

(Plaintiff's Opposition to State Defendants' Motion to Dismiss, p.14). This admission also highlights an additional reason why no case or controversy exists as between plaintiffs and these defendants. What plaintiffs seek from the State defendants is funding in aid of desegregation. Even assuming education is a matter of statewide concern, plenary authority over education, including funding, is constitutionally vested in the state legislature. Cal.Const., Art. IX, §§ 1 & 6.

[14] For these reasons, I conclude that the complaint fails to state a claim against defendants Governor Brown and Superintendent Riles and that this Court lacks subject matter jurisdiction. However, because this is plaintiffs' first attempt, leave will be granted, if plaintiffs so choose, to file an amended complaint as against these defendants. In granting such leave, I am mindful that another court has reached a different conclusion on apparently similar allegations, although the Eleventh Amendment and Article III issues appear not to have been raised there. *San Francisco NAACP v. San Francisco Unified School Dist.*, 484 F.Supp. 657 (N.D.Cal. 1979). Although the State defendants' alternative motion for a more definite statement has now been mooted, if plaintiffs choose to amend they should address the case or controversy requirement by specific factual allegations. In doing so, the legitimate concern of the State defendants for a more definite statement should be met.

Order

For the foregoing reasons,

IT IS ORDERED:

1. The motion to dismiss of the District defendants is denied.

2. The motion to dismiss of the defendants California State Board of Education and California Department of Education is granted without leave to amend and the action is hereby dismissed as against said defendants.

3. The motions to dismiss of defendants Governor Brown and Superintendent Riles are granted with 20 days' leave to file an amended complaint.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405; that on December 22, 1983, I served the within *Supplemental Appendix* in said action or proceeding by depositing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

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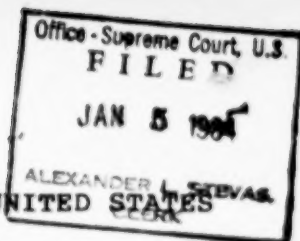
I declare under penalty of perjury that the foregoing is true and correct. Executed on December 22, 1983, at Santa Monica, California.

Kirk W. Harney
(Original signed)

No. 83-892

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983



CALIFORNIA STATE DEPARTMENT OF EDUCATION;
CALIFORNIA STATE BOARD OF EDUCATION; AND
SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

vs.

LOS ANGELES BRANCH NAACP, BEVERLY HILLS-
HOLLYWOOD NAACP; SAN PEDRO-WILMINGTON NAACP;
WATTS NAACP; SAN FERNANDO VALLEY NAACP; AND
CARSON NAACP,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF OF NAACP RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Did the Court of Appeals for the Ninth Circuit err in holding that the Equal Education Opportunities Act of 1974, 20 U.S.C. §§1701-1758, abrogates California's immunity from suits in the federal courts under the Eleventh Amendment of the United States Constitution?

II

Did the Court of Appeals for the Ninth Circuit err in holding that certain state educational officers and agencies, alleged to be causally related to the creation and perpetuation of de jure segregation in a public schools system, were proper parties for a federal school desegregation case, despite their claim of sovereign immunity under the Eleventh Amendment of the Constitution of the United States?

STATEMENT OF THE CASE

This is a school desegregation case involving the historic establishment, perpetuation and expansion of school segregation in Los Angeles, California, the nation's second largest school district. The action is a class action, brought by the six metropolitan branches of the NAACP, on behalf of a large class of black students attending the schools in the Los

Angeles Unified School District. The defendants are public officials at two levels of government, hereafter termed "the local defendants" and "the state defendants", respectively. The local defendants are the Los Angeles Unified School District, the Board of Education of the City of Los Angeles and the Los Angeles Superintendent of Schools, in his official capacity. The state defendants are the California State Board of Education (hereafter, "the SBE"), California Department of Education (hereafter, "the SDE"), and the California Superintendent of Public Instruction, in his official capacity (hereafter, "the SPI"). The First Amended Complaint also included the Governor of California. However, the District Court ordered dismissal of the Governor as a defendant and the Ninth

Circuit Court of Appeals affirmed the dismissal. 1/

The complaint before the district court was filed on April 15, 1981 and was, subsequently, amended on August 16, 1981. The complaint seeks declaratory and prospective injunctive relief against the defendants on the basis of their purposeful, concerted and independent participation and responsibility for creating, actively condoning, expanding, and maintaining a racially dual school system in Los Angeles in violation of the United States Constitution.

Petitioner state defendants' first attack on the subject matter jurisdiction of the federal courts to act on the complaint was by joint motions

1/ No further appeal is taken from that dismissal and the matter is final.

to dismiss under Rule 12, Fed. R.Civ.P., attacking the complaint on grounds of its failure to allege any case or controversy under Article III and its inclusion of allegations of wrongdoing and harm by agencies and officers entitled to invoke the Eleventh Amendment sovereign immunity of the State of California.

Upon renewed hearing after one amendment of the complaint, the district court ruled that the complaint should be dismissed as to the state defendants for different reasons. It held that the action was barred against the SBE and SDE, as agencies of the state, because of the sovereign immunity of the Eleventh Amendment. It held, further, that the action was barred under Article III, against the SPI and Governor because of a perceived failure by the plaintiffs to allege any case or controversy capable of remedy by these defendants through the court. (Sup-

plemental Appendix, pp. 24 - 25.) On appeal to the Ninth Circuit Court of Appeals, the subject matter jurisdiction issues were reargued with plaintiffs invoking the jurisdictional basis of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 et seq. (hereafter, "the EEOA"), in addition to the First, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution and federal enforcement statutes, including 42 U.S.C. §§1981, 1983, 1988 and 2000d; 28 U.S.C. §§1331, 1343(3) and 1343(4); and 28 U.S.C. §§2201 and 2202.

The Court of Appeal reversed the judgment of the district court, except for the judgment dismissing the Governor. It remanded the case for further pre-trial action. The court below resolved the Article III issues when it found "that the NAACP had alleged actual injury traceable to the actions of the state defendants."

Further, it held that the Eleventh Amendment immunity of California agency defendants, including the SPI, has been abrogated by Congress' adoption of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701 et seq. (714 F.2d at p. 951) Finally, it held that the "NAACP does not seek retrospective damages from the Superintendent, and does not contravene the Eleventh Amendment bar against such action." (citing *Edelman v. Jordan*, 415 U.S. 651 [1974]). (714 F.2d at p. 952)

Rather than answering the complaint, petitioners applied for review of the order below, on writ of certiorari.

SUMMARY OF ARGUMENTS

1. The petition should be denied since it does not present a serious question of constitutional law not appropriately resolved in the courts below. First, the Ninth Circuit reading of the

language, purpose and intent of the Equal Educational Opportunities Act, 20 U.S.C. §§1701 et seq., as effective to abrogate state immunity, is competent and not in conflict with any decision of this Court. Second, the EEOA clearly permits individual actions against state education agencies. The court's analysis is consistent with and controlled by *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) and *Hutto v. Finney*, 437 U.S. 678 (1978).

2. Regardless of whether subject matter jurisdiction in this case can be based on 20 U.S.C. §1701 et seq., the Eleventh Amendment is not a bar to a federal school desegregation case against state authorities, because those actions are actions for prospective injunctive relief, only ancillary affecting state treasuries. This case is controlled by this Court's unanimous decision in *Miliken v. Bradley*, 433 U.S. 267 (1977).

REASONS FOR NOT GRANTING REVIEW

1. **The Petition Does Not Present a Serious Question of Constitutional Law Not Appropriately Resolved Below.**

The petition should be denied since it does not present a serious question of constitutional law not appropriately resolved in the courts below. First, the Ninth Circuit reading of the language, purpose and intent of the EEOA to abrogate state immunity is competent and not in conflict with any decision of this Court. Second, the EEOA clearly permits individual actions against state education agencies. The court's analysis is consistent with and controlled by *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) and *Hutto v. Finney*, 437 U.S. 678 (1978).

The Petitioners have cast their petition in terms of one issue only, i.e., review of the Ninth Circuit holding that the state's Eleventh Amendment immunity

was abrogated by Congressional enactment of the Equal Educational Opportunities Act, 20 U.S.C. §§1701 et seq. Petitioners do not argue with the proposition that state immunity can be abrogated by the Congress (Pet. at p. 7). They argue only with the application by the court below of the "standard and analysis necessary to determine if Congress has legislatively lifted the State's immunity." (Pet. at p. 7) In other words, the sole claim is that the court below misapplied the standards articulated in *Quern v. Jordan* (1979) 44 U.S. 332, 342-345, and *Fitzpatrick v. Bitzer*, (1976) 427 U.S. 445, 455-456.

Citing *Quern*, petitioners contend that indication of congressional intent to abrogate either "must be in clear language in the statute or clearly evident from the legislative history of the enactment." (Pet., p. 7) They claim that the court below erred in its analysis of the of the

plain meaning of the statute. The court concluded that the California's state educational agencies (and its superintendent) clearly fall within the Act's definition of "state educational agency." (714 F.2d at p. 951) It further observed that Congress explicitly provided in 20 U.S.C. §1706 that individuals could bring actions against these state agencies in the federal courts for violations of the prohibitions and that Congress specifically noted its intent to use its enforcement powers in 20 U.S.C. §1702(b). (714 F.2d at p. 951.)

The only positive argument advanced to justify review is a flat contention that the proviso stated in §1702(b) is, in reality, a Congressional statement not to abrogate state immunity, by expressing intent not to modify or enlarge the scope and power of the federal courts, a wholly novel proposition, supported with nothing

but officious double-talk. ["...imposing a duty and potential liability on the States while maintaining the States' immunity from private suits is consistent...."] (Pet., p. 10). Rationalized to fill the interpretive gap is an even more novel reading of the Act to allow private suits only against "appropriate parties" and suits by the Attorney General exclusively against states. (Pet., p. 12)

Finally, though not covered in the opinion of the court below, Petitioners flatly assert that there is no legislative history of the EEOA on the question of state immunity. Their review cites and extends only the 1974 U.S. Code Congressional and Administrative News and no congressional debate, committee reports, or committee hearings relating to the legislation.

The construction suggested by the petitioners is merely an attempt to inject

grammatical ambiguity into the statute, where none exists. The whole purpose of the EEOA is to set uniform remedial standards for the federal courts to follow in these now-traditional desegregation suits, specifying "appropriate remedies for the orderly removal of the vestiges of the dual school system." See 20 U.S.C. §1701(b). Rather than limit federal court authority, the §1702(b) proviso of Congressional intent not to modify or diminish the authority of the federal courts is a plain statement negating any construction of the Act as an assertion of congressional power to limit or modify federal appellate jurisdiction under Article III. That subject was a matter of considerable debate. (See for example, the debates on the Education Amendments of 1974, Remarks of Senator William L. Scott re amendment to SB 1539, Congressional Record at p. 14228.)

**2. The Eleventh Amendment Is Not a Bar
To Federal School Desegregation Action
Against State Authorities.**

Regardless of whether subject matter jurisdiction in this case can be based on 20 U.S.C. §1701 et seq., the Eleventh Amendment is not a bar to a federal school desegregation action against state authorities, because those actions are actions for prospective injunctive relief, only ancillary affecting state treasuries. This case is controlled by this Court's unanimous decision in *Miliken v. Bradley*, 433 U.S. 267 (1977).

The First Amended Complaint is an action for school desegregation seeking declaration of de jure school segregation liability against state and local defendants grounded, among others, upon this Court's opinions in *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Dayton Board of Education v.*

Brinkman, 433 U.S. 406 (1977), and 443 U.S. 526 (1979); and Penick v. Columbus Board of Education, 443 U.S. 449 (1979).

Upon a finding of liability, the complaint seeks prospective injunctive remedies not uncommon with those of several other federal courts who have found systemwide de jure school segregation. As such, the relief sought in this case is permitted rather than barred by the Eleventh Amendment. This Court's unanimous opinion in *Milliken v. Bradley*, supra., raised by similar state educational defendants, 2/ permits federal injunctive action requiring compliance, now and hereafter, with the command of

2/ The petition for certiorari of the state defendants in *Milliken* was carried by the State Board of Education, the State Superintendent and the Governor of Michigan, the Attorney General and the State Treasurer (See, 433 U.S. 267, 272, footnote 6.)

Brown v. Board of Education, (Brown II),
349 U.S. at p. 301, to operate a racially
nondiscriminatory school system, free of
the vestiges of de jure segregation.

Even though the court below only
mentioned the holding of **Milliken v. Bra-**
dley in footnote and did not rely upon
that case, this Court certainly will re-
cognize **Milliken** as controlling on the
suitability of state education officials
in federal court school desegregation
cases. This Court's holding in **Milliken**,
regarding the appropriateness of equitable
ancillary remedies, including state defen-
dants, when their liability is directly
fixed and when they are necessary partici-
pants for appropriate Fourteenth Amend-
ment-based equitable remedies.

Reliance upon traditional equitable
remedial power of the federal court to
vindicate the Fourteenth Amendment school
desegregation rights is firmly established

by this Court and should not vary simply because state agencies and officials are defendants. See *Brown v. Board of Education*, (Brown II), 349 U.S. 294 (1955); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1972); *Keyes*, supra; *Dayton Board of Education v. Brinkman*, (Dayton I), supra.

CONCLUSION

Based on the foregoing arguments and authorities, the respondents urge the Court to deny review and hearing on the Petition For Certiorari by summary action. The Eleventh Amendment is no bar to this school desegregation case. Pretrial action on the First Amended Complaint should proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and not a party to the within above-entitled action; my business address is 4401 Crenshaw Blvd., Suite 311, Los Angeles, CA 90043. On January 3, 1984, I served the within Brief of NAACP Respondents in Opposition to Petition For Writ of Certiorari in Case No. 83-892 on the persons interested in said action by placing true copies thereof enclosed in sealed envelopes with postage thereo fully prepaid, in the United States post office at Inglewood, California, addressed as follows:

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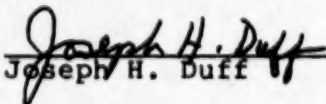
Courtesy copy to:

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Respondents claim the privilege of Rule 25(a), Federal Rules of Appellate Procedure: "briefs shall be deemed filed on day of mailing if the most expeditious form of delivery by mail . . . is utilized."

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on January 3, 1984 at Los Angeles, California.



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ALEXANDER L. STEVAS,
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No. 83-892

In the Supreme Court of the United States

OCTOBER TERM, 1983

CALIFORNIA STATE DEPARTMENT OF EDUCATION,
ET AL., PETITIONERS

v.

LOS ANGELES BRANCH NAACP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.*, abrogates the states' Eleventh Amendment immunity from suit in the federal courts.

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In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents, six metropolitan branches of the National Association for the Advancement of Colored People, filed this school desegregation case in the United States District Court for the Central District of California on April 15, 1981, on behalf of their members and a putative class of all black children attending the Los Angeles City schools (Pet. App. A2; Pet. Supp. App. 7). The complaint named as defendants the Los Angeles Unified School District, the Board of Education of the City of Los Angeles, and the Los Angeles Superintendent of Schools (the local defendants); it also named the Governor of California and petitioners, the California State Department of Education,

the California State Board of Education and the California Superintendent of Public Instruction (the state defendants) (Pet. App. A2, A13 n.1).

Respondents alleged in their complaint that the defendants had created and maintained an unconstitutionally segregated school system in the Los Angeles Unified School District. The defendants moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b), for lack of jurisdiction and failure to state a claim upon which relief could be granted. The district court granted the motion with respect to the State Department of Education and the State Board of Education on the ground that the Eleventh Amendment to the United States Consitution barred suits against these state agencies in the federal courts (Pet. App. A2; Pet. Supp. App. 23). The court dismissed the claims against the California Superintendent of Public Instruction and the Governor for failure to allege a case or controversy under Article III of the Constitution (Pet. App. A2). The court thereupon entered a judgment pursuant to Fed. R. Civ. P. 54(b) dismissing the claims against the state defendants.¹

2. The court of appeals reversed the dismissal of all claims against the state defendants except that against the Governor (Pet. App. A1-A14). The court first held that

¹The local defendants moved for dismissal on the ground that the suit against them was barred by adjudication of an identical claim in *Crawford v. Board of Education*, No. C822854 (Los Angeles County Superior Ct.). The district court denied the motion and certified an interlocutory appeal (Pet. App. A13 n.1; Pet. Supp. App. 17). In a separate decision, the court of appeals reversed and remanded, holding that respondents are barred from relitigating the claim that the school district was intentionally segregated on or before September 10, 1981, the date the state court accepted the desegregation plan that ended the *Crawford* litigation. *Los Angeles Unified School District v. Los Angeles Branch NAACP*, 714 F. 2d 935 (9th Cir. 1983). On March 5, 1984, the court of appeals entered an order granting respondents' petition for rehearing en banc.

respondents "ha[d] alleged a justiciable case or controversy against each of the state defendants" (*id.* at A3) and that, "should unlawful segregation be found here, the district court could formulate a remedy in which the state defendants could participate" (*id.* at A4).

The court of appeals then held that the Eleventh Amendment did not bar the claims against the State Department of Education and the State Board of Education. It ruled that the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.*, abrogates the Eleventh Amendment immunity of those agencies from suit in federal court. The court observed (Pet. App. A7) that the Act expressly prohibits racial segregation by a "State educational agency" (20 U.S.C. 1703, 1720(a)), which is defined as "the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools" (20 U.S.C. 3381(k)).

The court of appeals acknowledged that respondents had not relied upon the Equal Educational Opportunities Act in the district court (Pet. App. A14 n.8). It ruled, however, that "the Act may be pleaded here for the first time on appeal," because respondents' complaint "unquestionably raises sufficient facts to provide for a complaint under the jurisdictional section of the Equal Educational Opportunities Act, 20 U.S.C. § 1706" (Pet. App. A8).²

The court of appeals analyzed the Eleventh Amendment defenses of the Superintendent of Public Instruction and the Governor in light of this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), which held that the Eleventh

²The court of appeals rejected respondents' contention that Congress had set aside the states' immunity from suit in enacting 28 U.S.C. 1331, 1343 and 42 U.S.C. 1983 (Pet. App. A6). The propriety of that ruling is not before the Court.

Amendment generally does not bar actions for injunctive relief against state officers in their official capacities. The court rejected the Superintendent's argument that he is immune from suit because issuance of the injunctive relief sought by respondents would require payment of funds from the state treasury (Pet. App. A9, citing *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). It also rejected his contention that he is immune from suit because he has an insufficient connection with the alleged unconstitutional acts to come with the rule of *Ex parte Young* (Pet. App. A10).³ The court held, however, that the Eleventh Amendment bars suit against the Governor because "the Governor's general duty to enforce California law under the circumstances of this case does not establish the requisite connection between him and the unconstitutional acts alleged by [respondents]" (Pet. App. A12).⁴

DISCUSSION

1. The petition for a writ of certiorari presents the question whether the court of appeals erred in holding that the Equal Educational Opportunities Act abrogates the states' Eleventh Amendment immunity from suit in the federal courts. In view of the interlocutory posture of this case, however, we submit that the petition should be denied.

³The court stated that its rejection of the Superintendent's arguments based on *Ex parte Young* was "redundant" in light of its ruling that "the Equal Educational Opportunities Act abrogates any immunity he might have thought he possessed" (Pet. App. A10-A11). The court's discussion of that Act, however, addresses only the Eleventh Amendment immunity of the State Department of Education and the State Board of Education (Pet. App. A5-A8). The petition for certiorari does not seek review of the court of appeals' ruling that the Superintendent is a proper party defendant under the rationale of *Ex parte Young*.

⁴The court's ruling in this regard is difficult to reconcile with its determination that a justiciable controversy exists between respondents and the Governor (Pet. App. A2-A5). Respondents, however, do not contest the dismissal of the Governor as a defendant (Br. in Opp. 4 n. 1).

Ordinarily, we would agree that a decision respecting the immunity of a party from suit is appropriately reviewed by this Court at the interlocutory stage. Cf. *Abney v. United States*, 431 U.S. 651 (1977). We note, however, that the State will continue to be represented in this litigation regardless of the disposition of the instant petition. The court of appeals held that the State Superintendent of Public Instruction is a proper party defendant under the rationale of *Ex parte Young* (Pet. App. A8-A10), and petitioners do not challenge that ruling in this Court. The Superintendent, in addition to his other duties, is the secretary and executive officer of the State Board of Education and the executive officer of the State Department of Education (see *id.* at A13 n.3). The question whether these agencies should remain nominal defendants in this action is thus of little practical significance.

If petitioners prevail on remand, there will be no need for them to seek review of the question presented in the petition. On the other hand, if they are unsuccessful on remand, they may raise whatever claims they deem appropriate, including the one presented in this petition, in an appeal from the final judgment, and they may thereafter seek further review of their claims in this Court. See *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923).

2. In any event, the court of appeals correctly applied settled legal principles in resolving the question presented. The decision below does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

a. Petitioners concede (Pet. 6-7), as they must, that Congress has the authority under Section 5 of the Fourteenth Amendment to enact legislation lifting the states' immunity from suit in the federal courts. *Fitzpatrick v. Bitzer*, 427

U.S. 445 (1976). They assert, however, that the Equal Educational Opportunities Act cannot properly be read to abrogate that immunity. We disagree.⁵

This Court's decisions "require[] an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" *Pennhurst State School & Hospital v. Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 8 (quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979), which held that 42 U.S.C. 1983 does not override the states' Eleventh Amendment immunity). The language of the Equal Educational Opportunities Act evinces an unambiguous congressional intent to subject state agencies and officials to suits in federal court.

Section 1703 of Title 20 provides that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin" (emphasis added). That section goes on to prohibit various practices by an "educational agency" that may deny equal educational opportunity, including "the deliberate segregation * * * of students on the basis of race, color, or national origin among or within schools" (20 U.S.C. 1703(a)). The term "educational agency" is defined in 20 U.S.C. 1720 as "a local educational agency or a 'State educational agency' as defined by Section 3381(k) of this title." Section 3381(k) defines the term "State educational agency" as "the State

⁵Petitioners do not contend that the court of appeals erred in permitting respondents to plead the Act for the first time on appeal. In any event, since the facts alleged are sufficient to support jurisdiction under the Act (Pet. App. A8), the court of appeals' ruling in this regard is unexceptionable. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70 n.14 (1978); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 608 n.6 (1978); cf. *Forman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.").

board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools" (20 U.S.C. 3381(k)). Section 1706 of Title 20 authorizes an individual who is denied an equal educational opportunity to "institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate," and Section 1708 confers jurisdiction on the district courts to entertain proceedings instituted under Section 1706.

Congress's intent to subject state educational agencies to suit in federal court under the Act could hardly have been made more explicit. The Act expressly prohibits the denial of equal educational opportunity by state educational agencies and officials,⁶ and authorizes an individual who is denied an equal educational opportunity to file suit in federal court "against such parties * * * as may be appropriate" (20 U.S.C. 1706). This constitutes an unequivocal expression of congressional intent to subject state educational agencies and officials to suit under the Act, and it effectively overrides the states' Eleventh Amendment immunity. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 693-700 (1978) (state agency liable for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988); *Fitzpatrick v. Bitzer*, *supra* (backpay and attorney's fees may be awarded against the states in suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*); *Parden v. Terminal Ry.*, 377 U.S. 184, 187-190 (1964)

⁶Where, as here, primary responsibility for supervision of public elementary and secondary schools is shared among several state educational agencies and officials, each is subject to suit under the Act. *Idaho Migrant Council v. Board of Education*, 647 F. 2d 69 (9th Cir. 1981).

(state owning and operating a railroad in interstate commerce is subject to suit under the Federal Employer's Liability Act, 45 U.S.C. 51 *et seq.*).⁷

Since petitioners fall squarely within the Act's definition of "State educational agency" (and do not contend otherwise) they are proper parties defendant in this action.

b. In support of their argument that the Act does not abrogate the states' immunity from suit, petitioners principally rely (Pet. 10-12) upon this Court's decision in *Employees v. Missouri Public Health & Welfare Department*, 411 U.S. 279 (1973). That case, however, does not support petitioners' position.

Employees was an action under the Fair Labor Standards Act brought by employees of state health facilities for overtime pay and damages. The Court held that the suit was barred by the Eleventh Amendment, notwithstanding amendments in 1966 that extended the Act's coverage to state employees. The Court observed that the 1966 amendments made no change in the section subjecting employers to suit for violations of the Act (Section 16(b), 29 U.S.C. 216(b)), and it found nothing in the legislative history of the amendments suggesting that Congress intended to deprive the states of their constitutional immunity from suit in federal courts. The Court pointed out that its ruling did not render the extension of the Act to cover state employees

⁷Petitioners are correct in asserting (Pet. 12-13) that the legislative history of the Equal Educational Opportunities Act does not expressly address the states' Eleventh Amendment immunity from suit in the federal courts. Because the language of the Act clearly subjects state educational agencies and officials to suit in federal court, however, the fact that the legislative history of the Act is silent concerning the Eleventh Amendment is inconsequential. Cf. *Hutto v. Finney*, 437 U.S. at 696 (Congress, when exercising its powers under Section 5 of the Fourteenth Amendment, need not "expressly stat[e] that it intends to abrogate the States' Eleventh Amendment immunity").

meaningless because the Secretary of Labor was authorized to bring suit on their behalf under Sections 16(c) and 17 of the Act, 29 U.S.C. 216(c) and 217.

The Court in *Employees* declined to find that Congress had set aside the states' immunity from suit "where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear" (411 U.S. at 286-287). The Court stated that "[i]t would * * * be surprising * * * to infer that Congress deprived Missouri of her constitutional immunity without changing the old § 16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away" (411 U.S. at 285).

The present case presents an entirely different situation. It does not involve an ambiguous amendment to an existing statute under which the states had not been amenable to suit, but rather a new enactment evincing a clear congressional intent to subject state educational agencies to suit in federal court by "putting [them] on the same footing" as local educational agencies. See 20 U.S.C. 1703, 1706, 1720(a).⁸

Petitioners' reliance (Pet. 9-10) on Section 1702(b) of Title 20 is also misplaced. Congress in Section 1702(b) "specif[ie]d appropriate remedies for the elimination of the vestiges of dual school systems,"⁹ but also provided expressly

⁸Other factors serve to distinguish this case from *Employees*. First, the claims in *Employees* were based on a statute enacted pursuant to the Commerce Clause rather than Section 5 of the Fourteenth Amendment. See *Hutto v. Finney*, 437 U.S. at 698-699 n.31. Second, the Court in *Employees* was influenced by the facts that the FLSA permitted the employee to "recover double" against the employer and that "private enforcement of the Act was not a paramount objective" (411 U.S. at 286) — factors not present here.

⁹The remedies are listed, in order of priority, in 20 U.S.C. 1713.

that nothing in the Act is "intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." Section 1702(b) is directed exclusively at the remedial measures available to the federal courts in desegregation cases;¹⁰ it does not address the question of proper parties defendant in such suits. Section 1702(b) is entirely consistent with other provisions of the Act explicitly subjecting state education agencies to suit in the federal courts.

Under petitioners' interpretation of the Act (Pet. 11-12), private persons would be able to sue only local educational entities, while the Attorney General — who is also authorized to file suit under Section 1706 — would be able to proceed against both state and local educational entities. Nothing in the language or legislative history of the Act, however, even remotely suggests that Congress intended such an anomalous result, and no court has ever interpreted the Act in this manner.¹¹

¹⁰The language in Section 1702(b) regarding the remedial authority of federal courts derives from the Scott-Mansfield substitute for the proposed Griffin amendment to S. 1539, 93d Cong., 2d Sess. (1974). See 120 Cong. Rec. 15076-15079 (1974); S. Conf. Rep. 93-1026, 93d Cong., 2d Sess. 34, 154 (1974); H.R. Conf. Rep. 93-1211, 93d Cong., 2d Sess. 34, 154 (1974). The purpose of the Scott-Mansfield substitute was "to make clear that the bill is not intended to purport to prevent the courts from upholding the Constitution" (120 Cong. Rec. 15078 (1974) (remarks of Sen. Scott)). The substitute was prompted by congressional concerns about the constitutionality of the Griffin amendment's restrictions on the use of student transportation as a means of dismantling dual school systems (*ibid.*).

¹¹Relying on *Milliken v. Bradley*, 433 U.S. 267 (1977), respondents assert (Br. in Opp. 14-17) that, even if the Equal Educational Opportunities Act does not override the states' immunity from suit, this action is not barred by the Eleventh Amendment because it seeks only prospective injunctive relief. Insofar as it relates to the State Board of Education and the State Department of Education, respondents' position is incorrect. Although the State Board of Education was one of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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defendants in *Milliken* (see 433 U.S. at 272-273 n.6), the Court's discussion of the Eleventh Amendment issue referred only to the immunity of the defendant state officials (433 U.S. 288-291). Subsequent decisions of this Court make clear that the Eleventh Amendment bars unconsented suits against state agencies or departments "regardless of the nature of the relief sought." *Pennhurst State School & Hospital v. Halderman*, slip op. 10. See also *Alabama v. Pugh*, 438 U.S. 781 (1978).